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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

BY RICHARD W. GILL, *Attorney at Law,*

AND

JOHN JOHNSON, *Clerk of the Court of Appeals.*

VOL. IV.

CONTAINING CASES IN 1832.

~~GEORGE & ALLEN~~

Baltimore:

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NAMES OF THE JUDGES, &c.
DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

Hon. JOHN BUCHANAN, Chief Judge.
Hon. RICHARD TILGHMAN EARLE, Judge.
Hon. WILLIAM BOND MARTIN, do.
Hon. JOHN STEPHEN, do.
Hon. STEVENSON ARCHER, do.
Hon. THOMAS BEALE DORSEY, do.

OF THE COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

OF THE COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's, Charles and Prince George's Counties.*

Hon. JOHN STEPHEN, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. CLEMENT DORSEY, do. Appointed 21st April, 1832, *vice* Hon. John R. Plater, deceased.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne's and Talbot Counties.*

Hon. RICHARD TILGHMAN EARLE, Chief Judge.
Hon. JOHN B. ECCLESTON, Associate Judge, appointed 8th February, 1832, *vice* Lemuel Purnell, resigned.
Hon. PHILEMON B. HOPPER, do.

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel and Montgomery Counties.*

Hon. THOMAS BEALE DORSEY, Chief Judge.
Hon. CHARLES J. KILGOUR, Associate Judge.
Hon. THOMAS H. WILKINSON, do.

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset and Worcester Counties.*

Hon. WILLIAM BOND MARTIN, Chief Judge.
Hon. ARA SPENCE, Associate Judge.
Hon. WILLIAM TINGLE, do.

FIFTH JUDICIAL DISTRICT—*Frederick, Washington and Allegany Counties.*

Hon. JOHN BUCHANAN, Chief Judge.
Hon. ABRAHAM SHRIVER, Associate Judge.
Hon. THOMAS BUCHANAN, do.

SIXTH JUDICIAL DISTRICT—*Baltimore and Harford Counties.*

Hon. STEVENSON ARCHER, Chief Judge.
Hon. RICHARD B. MAGRUDER, Associate Judge, appointed 30th October, 1832, *vice* Hon. Charles W. Hanson, resigned.
Hon. THOMAS KELL, do.

OF BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.
Hon. WILLIAM McMECHEN, Associate Judge.
Hon. ALEXANDER NISBET, do.

ATTORNEY GENERAL.

JOSIAH BAYLEY, Esquire, appointed Attorney General of Maryland, 22d July, 1831, *vice* ROGER B. TANEY, Esquire, resigned, and appointed Attorney General of the United States

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

JUNE TERM, 1832.

THE CHESAPEAKE AND OHIO CANAL COMPANY

vs.

THE BALTIMORE AND OHIO RAIL ROAD COMPANY.

In the month of June, 1828, *The Baltimore and Ohio Rail Road Company*, claiming under their charter, and in pursuance of locations, surveys and purchases of a route for a contemplated rail road, filed several bills in the Court of Chancery, against the *Chesapeake and Ohio Canal Company*. These bills suggested, that the defendants had obtained an injunction prohibiting the complainants from obtaining a title, or right of way, to their located route, and having thus stopped the progress of the complainants' undertaking, were proceeding in their turn, upon the assumption of a prior and paramount right of choice, to acquire title to the route surveyed and adopted by the complainants. The Chancellor upon this case granted an injunction. The defendants in their answers relied upon a prior right of choice to the route in controversy, and that it was impracticable for both companies to occupy it, for the purposes of their several charters. The Chancellor, upon final hearing, granted a perpetual injunction to the complainants, from which, an appeal was taken. It appeared, that the *Baltimore and Ohio Rail Road Company's* charter, was granted by this State on the 28th February, 1827. It declared that as soon as 10m. shares of the capital stock should be subscribed for, the subscribers should be incorporated; and it authorised the construction of a Rail Road from the city of *Baltimore* to some suitable point on the *Ohio* river, with as many tracks as the Directors might deem necessary, with power to enter upon, use, excavate, purchase, and condemn any land which may be wanted for the site of the road, and its necessary works. On the 23d April, 1827, this company was fully organized; its surveys of, and contracts for the route, were made

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in May and June, 1828. The charter of the *Canal Company* originated with the State of *Virginia*, and was passed upon the 27th January, 1824. It authorized the appointment of commissioners to receive subscriptions to its stock, so soon as *Maryland*, *Pennsylvania*, *Congress*, and the *Potomac Company*, should assent to its provisions, and declared that whenever one-fourth of the stock "shall have been subscribed for," then the subscribers, their heirs and assigns, should be incorporated; it also provided for the *Canal Company* becoming the assignee and proprietor of the rights and property of the *Potomac Company*, which was chartered in 1784, to cut such canals, erect such locks, and perform such other works on both sides of the river *Potomac*, as it shall judge necessary, for opening, improving, and extending the navigation of that river, above tide water to the highest part of its north branch to which navigation can be extended, the stockholders of that company receiving an equivalent for the transfer, in the stock of the new company. This charter was accepted, assented to, and confirmed by this *State* upon the 31st January, 1825; and by *Congress* so far as to authorize a canal to be cut in the *District of Columbia*, upon the 3d March, 1825; by the *Potomac Company* upon the 16th May, 1825; and by *Pennsylvania*, conditionally, upon the 9th July, 1826. On the 14th November, 1827, the stock of the *Canal Company* was subscribed for, and on the 20th June, 1828, it was duly organized. On the 15th August following, the *Potomac Company* transferred its rights to the *Canal Company*, and this transfer was accepted upon the 17th September, 1828. The canal charter designated the valley of the *Potomac* for the route of the intended canal. It was in proof that between the *Point of Rocks* and *Cumberland*, in the valley of the *Potomac*, on the *Maryland* shore, (which embraced the route in controversy,) there were between 40 and 50 miles of narrow difficult passes, along which, the canal, if made without reference to the rail road, would have to be supported by embankments made in the bed of the river, many feet below the usual low water mark; that if the *Rail Road Company* has the choice of location, then the canal could either not be built at all, or at such an enormous cost as to render it impracticable. HELD, that the *Chesapeake and Ohio Canal Company* has the priority of right in the choice, or selection of ground, for the route and site of the canal in the valley of the *Potomac*, that the injunction should be dissolved, and the bills dismissed with costs.

Upon the true construction of the charter of the *Potomac Company*, (act of 1784, ch. 33) the great object in view, was the extension of a water communication from the tide water of the river *Potomac*, up to the highest practicable point on the north branch of that river, and the means such, as might be considered by the corporation necessary, and proper, for the accomplishment of that object, whether by sluices, dams, locks, or by canal navigation. The company was not restricted to improvements in the navigation of the bed of the river, nor to an election between different modes of improvement.

Under this construction of that charter, the valley of the *Potomac*, from tide water to the highest practicable point of navigation on the north branch,

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was specifically appropriated to the object contemplated ; and at the time the Company was formed, or became incorporated, it acquired a vested right (not the actual legal title to the land) to acquire land by purchase or condemnation along the shores of that river, to be exerted, wheresoever and whensoever, it should be thought necessary and proper, for the purposes of the charter.

The charter of the *Potomac Company* was a contract between the States of *Maryland*, and *Virginia*, and that Company, the obligations of which could not, without the assent of the corporation, be impaired by any act of the legislature of either of the States, nor by the concurrent acts of both, consistently with that section of the constitution of the *United States*, which declares that “no State shall pass any law impairing the obligation of contracts.”

The charter of the *Baltimore and Ohio Rail Road Company* (1826, ch. 123,) could not diminish the prior and paramount right of the *Potomac Company* to select or appropriate, by purchase or condemnation, any lands in the valley of the *Potomac*, for the route and site of a canal or canals, wherever it should think proper along the borders of the river, either in terms, or by any construction of it, that would have authorised the *Rail Road Company*, without the assent of the *Potomac Company*, to occupy for the route and site of the road any place along the river, in such a manner, as either to exclude that Company from a priority in a choice of a site or sites, for the construction of the works authorised by its charter, or in any manner to restrict and circumscribe it in the exercise of its prior right of election.

The *Chesapeake and Ohio Canal Company*, as the assignee of the *Potomac Company*, stands in its place, is invested with its prior and paramount rights, by express legislation of this *State*, and transfer from the *Potomac Company*, and is entitled to all its privileges and exemptions.

Neither *Maryland*, nor *Virginia*, without the consent of the other, nor both of them without the consent of Congress, could have repealed the charter of the *Potomac Company*, nor have received or authorised the surrender of it, and its works, to another company. The canal was declared to be, when completed, a public highway through the territories of the sovereign powers which created the *Potomac Company*, in which the *United States* were interested.

The consent of Congress to the charter of the *Chesapeake and Ohio Canal Company* was not given as the legislature of the *District of Columbia*. Congress has no capacity to act as the local legislature of that, or any other particular district, and can only act in the capacity of legislature of the Union, in which capacity, it assented to that charter, and no State, after having entered into a solemn agreement with another, is competent to renounce the constitutional assent of Congress as the legislature of the Union.

The *Potomac Company* having surrendered its charter, and transferred all its rights and property to the *Chesapeake and Ohio Canal Company*, with the assent of Congress, *Virginia* and *Maryland*, in consideration of a stipulated equivalent in the stock of the Canal Company, the value of which depends upon the inviolate conservation of the chartered rights of the Canal Com-

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- pany, the State of *Maryland* could not by subsequent legislation, impair the rights of the new Company without the consent of the parties interested. The charter of the *Chesapeake and Ohio Canal Company*, clearly and specifically designates the valley of the *Potomac*, for the intended route of the canal it was enacted to open, from tide water to *Savage Creek*.
- In the construction of a statute, the whole law is to be examined together, and one part construed by another, with a view to give effect and operation to the whole, if it can be done.
- It is laid down in some of the books, that in construing a statute, the title (being no part of it) is not to be regarded, but we have high authority in this country for a different rule of construction. The title, however, cannot control the express words of the enacting clauses.
- The preamble of a statute is a key to its construction.
- Where a corporation was created to effect a particular object, as to make a river navigable which was not so before, and no particular mode of accomplishing that result was pointed out in the charter, it will be intended, that the legislature designed that the river was to be made navigable, in any of the known modes, in which the navigation of a river may be improved.
- A corporation may forfeit its charter by non-user or mis-user of its franchises; but it is well known, that such forfeiture can only be enforced by judicial proceedings, instituted for that purpose, at the instance of the government; and that no cause of forfeiture can be taken advantage of collaterally or incidentally; and the same principle applies, as well, to a question of forfeiture of a particular franchise, as of the whole.
- It is not every non-user that will furnish a sufficient ground of forfeiture.
- Where there are various alternative modes of exercising a franchise, authorised without limitation of time by a charter, subject each of them to be changed at the will of the corporation, no experimental trial of one of the modes, could work a forfeiture of the right to resort to either of the other modes, during the continuance of the charter.
- There is no difference in principle, between a law that in terms impairs the obligation of a contract, and one that produces the same effect in the construction and practical execution of it; both are repugnant to the constitution of the United States, and void.
- Where the grant of an estate in land is defeasible on the non-performance of a condition subsequent, it is not defeated upon the mere happening of the contingency upon which it is defeasible, but the law permits it to continue beyond the time when such contingency occurs, unless the grantor or his heirs take advantage of the breach of such condition.
- The proceeding by the government for the breach of a condition subsequent, contained in a charter of incorporation, is by *scire facias*, or *quo warranto*.
- A private corporation aggregate may be dissolved by the death of all its members; or by the loss of an integral part, whereby it is rendered unable to do any corporate act, or to restore itself by a new election; or by a surrender to the government of its franchises; or by an act of the legislature repeal-

ing the act of incorporation with the assent of the corporation; or by a forfeiture of its charter through abuse or neglect of its franchises, as for a condition broken, there being a tacit condition in every such grant, that the corporation shall act up to the end of its institution.

A forfeiture must be judicially inquired into, but a dissolution need not be. Every law which is to wrest from an individual his property, without his consent, must be strictly construed.

All statutes *in pari materia* are construed as one law.

A State may contract with an individual, and it is equally certain, that two or more of the States may enter into a compact or agreement *inter se*.

A State may contract with an individual by an act of the Legislature, and two or more States may contract in that form, *inter se*.

No technical words are necessary to constitute a compact or contract, which are convertible terms, and neither need be used in the instrument creating it.

It is a mutual consent of the minds of the parties concerned, respecting some property or right that is the object of the stipulation, or something that is to be done or forborne, a transaction between two or more persons in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised or stipulated by the other, and any words manifesting that *congregatio mentium*, are sufficient to constitute a contract.

The terms "accept" and "assent to," are words of contract, and it was by virtue of such and similar terms in the constitution of the *United States*, that the Federal Government, when it received the sanction of the people, and the requisite number of States, became a compact between the parties to it and the Federal Government, and not a mere confederacy or league.

A charter, being a grant, is an implied contract with the corporation, not to re-assert the rights it has granted.

The corporate right to select and acquire land for the authorised purposes of a corporation, is property. It is an incorporeal hereditament, not a legal title to the land itself, nor a mere capacity or faculty to acquire and hold land, such as every individual possesses. But in addition to such capacity, it is a right or privilege, a portion of the eminent domain, vested in the corporation to acquire the legal title to land, subjected by the grant to its will, and thus to convert the incorporeal right into a corporeal hereditament, and in the franchise to choose and condemn land for any particular public purpose, that portion of the eminent domain granted and subsisting in one corporation, cannot be bestowed upon another to the prejudice of the former grant—nor can any other legally acquire any such right of way, or title to land over which the franchise extends, as will hinder the former corporation in the exercise and enjoyment of its franchise.

In ordinary cases the *State* may repeal or modify at pleasure any act of incorporation granted by it, before it is accepted, and when no rights have been acquired under it. Until accepted it is not a grant, nor the public faith pledged not to impair it.

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But in relation to the *Chesapeake and Ohio Canal Company*, although it was not actually incorporated, and had not accepted its charter before the *Baltimore and Ohio Rail Road Company* was chartered and organized, yet it is entitled to all the rights, benefits, and liberties, with which it would have been invested, if it had been organized before any antagonist corporation came into existence, on the ground of the compact and agreement of Congress, and the States of *Virginia* and *Maryland*, *inter se*, and between them and the *Potomac Company*, arising from the reciprocal and concurrent acts of the three former, and the assent of the latter, the consummation of which, was the consent of the *Potomac Company*, given anterior to the date of the *Rail Road Charter*, and under the Constitution of the *United States*, cannot be impaired by any thing contained in that charter.

An abridgement of the right of choice in selecting the route, impairs the obligation of the contract.

As between the holders of general or common land warrants, there is no priority of right to locate; this warrant, is a mere authority to the Surveyor or proper officer to make the survey, and the certificate is the inception of title, to which, the patent, when issued, relates. The title remains in the *State* until the warrant is located, and will pass under a junior warrant, if first executed.

But it is not so with an act of incorporation, which when accepted, amounts to a grant, and the right conferred, a vested franchise, existing independent of any act of location or survey, which the *State* cannot re-assert, nor grant to any other. It is a prior right to which all subsequent grants must yield.

A chartered company may lose its prior right by acquiescing in other works, inconsistent with such rights.

Statutes should be construed with a view to the original intent and meaning of the makers, and such construction should be put upon them, as best to answer that intention, which may be collected from the cause or necessity of making the statute, or from foreign circumstances, and when discovered ought to be followed, though such construction may seem to be contrary to the letter of the statute.

If laws and statutes seem contrary to one another, yet if by interpretation they may stand together, they shall stand; and when two laws only so far disagree or differ, as that by any other construction they may both stand together, the rule, that subsequent laws abrogate prior and contrariant laws, does not apply, and the last law is no repeal of the former.

Repeals of statutes by implication are things disfavored by law, and never allowed of, but when the inconsistency and repugnancy are plain and unavoidable.

When it is manifestly the intention of the Legislature that a subsequent act shall not control the provisions of a former Act, the subsequent act shall not have such operation, even though the words of it, taken strictly and grammatically, would repeal the former act.

Upon the motion to dissolve an injunction, the Chancellor confines himself exclusively to the consideration of the case, or combination of facts set

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forth in the bill, out of which the equity of the injunction arose, and to the answer of the defendant to those facts. PER BLAND, CHANCELLOR.

The best test of what are properly averments of facts in a bill or answer, is, whether they are such matters as a witness may be called upon to prove, or, the truth of which must be established by *evidence*, to enable a court to act; if they are not, then such averments are either, mere principles of equity, or some of those public and established facts, of which, the court is bound to take judicial notice without any proof. IB.

As to all those facts and circumstances of which a court is bound to take notice, on a motion to dissolve an injunction the parties stand before it in the same situation, as that, in which a dissolution is asked for, on the ground that the facts set forth in the bill give rise to no equity, on which an injunction ought to be granted. IB.

If it appears that the facts as stated in a bill, looking to it only, give rise to no equity, it is very certain that the injunction would be dissolved, whether the defendant had answered or not, or however imperfectly he might have answered. IB.

No evidence can be required to prove the existence of a fact which must have happened according to the constant and invariable course of nature, or to prove any general law, or other public matter which the courts are bound to notice. IB.

It is not the duty of the courts to take judicial notice of the execution of a public statute. The various modes in which public statutes are carried into effect, by the executive officers of government are mere facts, and must be proved as facts. If relied upon to avoid an equity upon which an injunction was rightfully granted, upon the motion to dissolve, the court cannot notice them. IB.

APPEAL from the Court of Chancery.

A bill was filed by the appellees, against the appellants, and the *Potomac Company*, on the 23d of June, 1828, which stated—That by an act of the legislature of *Maryland*, passed at December session, 1826, entitled, “An act to incorporate *The Baltimore and Ohio Rail Road Company*, it was enacted, that as soon as ten thousand shares of the capital stock of said company should be subscribed, the subscribers thereof should be incorporated into a company by the name of *The Baltimore and Ohio Rail Road Company*, and should be clothed with all the powers necessary to the construction ^{of} a rail road from the city of *Baltimore* to the river *Ohio*; that the sum required in order to the incorporation and organization of said company having been previously obtained, the said company was duly or-

ganized by the election of a president and directors to manage the affairs of the same; that the subscriptions to the capital stock of said company having been augmented, so as to amount in all to four millions of dollars, the said company found itself, at once prepared to commence the construction of said road, and possessed of means at least sufficient for its completion to the town of *Cumberland*, in *Alleghany* county; and that with a view to the construction of said road, the president and directors of said company caused all the various routes for said road to be examined by skillful engineers, in order to the determination of its general direction, who ultimately recommended the adoption of the southern route for the said road, to wit: from *Baltimore* to the *Potomac* river by the waters of the *Patapsco* and the *Monocacy*, striking the *Potomac* at the *Point of Rocks*, on the north-eastern side of the gap, at which, the *Potomac* passes through the *Catoctin* mountain, and thence to *Williamsport*, and thence with the *Potomac*, with inconsiderable deviations, to *Cumberland*; that the route for said road was finally adopted by the said president and directors, and the said president was ordered, by a resolution of the said board of directors, to proceed at once, to the construction of said road, upon said route. Your Orator further sheweth, that after said route for said road had been definitely ascertained by said report, and a day for the commencement of the operations of the company thereon assigned, the said president and directors deputed engineers to pass along the route thus adopted, and whenever the character of the ground was such, as to leave but little choice as to the location of said road, to make an actual location of the same at once over such ground, so that the said actual locations might serve as regulating points, for its location over the intermediate sections, and secure the passage of said road; and the said president and directors also deputed agents and attorneys to accompany said engineers, who were directed and required by the said president and directors to take all necessary or proper steps, to procure a title to the lands over which said actual locations were made, or to a

right way over them. Your Orator further sheweth, that under and in conformity to the requisitions of the said president and directors, the said engineers proceeded at once to the actual location of said road, over such portions of the route from the *Point of Rocks* aforesaid, to the town of *Cumberland* aforesaid, of which specifications of said locations which have been adopted and confirmed by the said president and directors, and which extend from the *Point of Rocks* inclusive, through *Frederick*, *Washington*, and *Alleghany* counties, to and over the lands of *John Mitchell*, in *Alleghany* county, lying immediately above *Mitchell's* rocks, and above the lands of *John Folch*, are herewith exhibited marked A B C D, &c. &c. That all the said locations were made with a *bona fide* intention on the part of your Orator, of perfecting its incipient title to the lands included in said locations, or on the route of said road, by purchase, condemnation, or otherwise, and of proceeding as speedily as possible, to the construction of said road over the same. That acting with this intention, and designing to accomplish this object, the said president and directors therefor deputed agents and attorneys to procure a title to the same, or a grant of a right over the same, as aforesaid; and that the aforesaid agents and attorneys of the said company, in pursuance of the authority aforesaid, and to accomplish the objects aforesaid, have obtained from various persons (whose names were specified) relinquishments or agreements, under hand and seal, binding themselves, their heirs and assigns, to grant to your Orator, a right of way for the *Baltimore and Ohio Rail Road*, either specifically according to the said actual locations, or generally, so as in either case, to bind all the lands lying within the said actual locations. Your Orator further shows, that all its above mentioned acts in locating said road, and obtaining and securing a right of way for said road over the lands included in said locations, were done by your Orator in strict pursuance of the powers conferred upon it, by the above mentioned act of assembly, and with a view to the accom-

plishment of the objects for which said company was incorporated, in the best possible manner, and not *merely* with the intent and design on the part of your Orator, to impede or obstruct the *Chesapeake and Ohio Canal or Potomac Companies*, hereafter mentioned, in the exercise of their respective powers; and that to carry into effect the agreements and relinquishments above mentioned, which are herewith exhibited marked 1 2 3 4 M M, and which your Orator prays may be taken as a part of this bill of complaint, the said agents and attorneys of the said president and directors were about to procure grants of said lands, or of rights of way over them, from said grantors, in conformity to their above exhibited agreements, by deed duly acknowledged for record, or to institute the necessary proceedings to enforce the specific performance of such agreements, where such grant was refused, and would have procured such grants, or have instituted such proceedings. But now so it is, may it please your honor, that after the above mentioned acts had been done, by and under the direction of the said *president and directors of the said Baltimore and Ohio Rail Road Company*; after the above mentioned actual locations of said road had been made, and the above mentioned contracts or agreements with your Orator made or entered into, upon an application to *Washington County Court*, as a court of equity, made in the name and on the behalf of the *Chesapeake and Ohio Canal Company*, and *Potomac Company*, by bill of complaint, praying a writ of injunction against your Orator, its attorneys, agents, and all persons whatsoever acting under its authority, or on its behalf, to prevent them from obtaining a title by purchase, deed, or condemnation, or otherwise, to any of the lands lying within the actual locations aforesaid, or to a right of way over them, and otherwise, to restrain the lawful acts and proceedings of your Orator, an injunction as prayed for, was accordingly issued; all of which will more fully appear from a copy of the said bill of complaint, and the said writ of injunction,

which are herewith exhibited, and which your Orator prays may be taken as part of this bill of complaint. Your Orator is advised, that neither the said *Potomac*, nor the said *Chesapeake and Ohio Canal Company*, has any such unquestionable and absolute right of election and pre-emption for the route or site of said canal, as to all or any of the lands lying within the aforementioned actual locations of said *Baltimore and Ohio Rail Road*, as is set forth in said bill of complaint; that as your Orator is credibly informed and believes, neither of the said companies had obtained, at the time of issuing the said injunction, any title or right, by location, purchase, deed, condemnation, or otherwise, to the exclusive use and possession of any of said lands: that the *Potomac Company* has been organized for more than forty years, and during all that period has not exercised any franchise or right of election as to said lands, which it may have derived under its charter, so as to vest in it an exclusive title to the same, or to any part of them, and that at the time when all the above mentioned locations and agreements were made, the said *Chesapeake and Ohio Canal Company* was not, and never had been, sufficiently organized so as to be competent, under its charter, to do such acts, make such contracts, or accept such gifts, grants and relinquishments, as were, and are necessary to vest in the said company any pre-emption, election, or exclusive right, to any of the lands lying within the aforesaid actual locations; although as your Orator has reason to believe, from the allegations of said bill of complaint of said company, and from other information from credible persons, and verily does believe, the said *Chesapeake and Ohio Canal Company* is now sufficiently organized for said purposes by the election of a president and directors. And your Orator further alleges, that it has good reason to believe, and verily does believe, that whilst the said *Chesapeake and Ohio Canal and Potomac Companies* were professing, in their said bill of complaint, an entire reliance upon the pretended priority and right of election,

as set forth in said bill, unaccompanied and unfortified by any location, purchase, condemnation, or other act, on their part, as necessary to secure and vest in them, such alleged priority and right of election, it was the principal, if not the sole object of the said companies, and their confederates, in obtaining said injunction, to obstruct and prevent your Orator, from enjoying the benefit of the above mentioned agreements and relinquishments, and from perfecting the same by deed or conveyance, so as to vest in your Orator, a complete legal title to the lands to which said agreements or relinquishments relate, or to a right of way over them, until the said *Chesapeake and Ohio Canal Company* was properly organized and prepared to appoint, and might appoint agents, adopt routes, make or cause to be made locations and contracts, and do and assent to all other acts which might be necessary or proper to vest in the said *Chesapeake and Ohio Canal Company* a title to the very lands, for which, or a right of way over which, the above agreements have been entered into with your Orator. And your Orator has also good reason to believe, and verily does believe, that it was the intent and design of the said companies, and their confederates, in applying for and obtaining said injunction, to set up their pretended priority for the purpose of restraining your Orator from enjoying the benefit of the above agreements, and from acquiring a title to the lands affected by the same, until the said *Chesapeake and Ohio Canal Company* was competent and prepared to acquire, and could acquire, a title to the said lands, in the very mode in which your Orator was about to obtain, and would have obtained a title to the same, but for the interposition of the above mentioned injunction, and might thus be enabled, if their propriety and right of election, set forth and relied upon in their said bill of complaint, should fail them, to resort to a title acquired by purchase, deed or condemnation, and acquired only, by fraudulently restraining your Orator from availing itself of the equitable title which it derives under said agreements; and as further evidence of

such intention and design, your Orator alleges, that it has been credibly informed, and verily believes, that since the said locations and agreements have been made, and the said injunction obtained, and before, attempts have been made by one or more agents or persons, professing to act under the authority of the said companies, and on their behalf or for their benefit, to dissuade and prevent parties to the said agreements from performing their said contracts, and to procure from them, deeds for, or written agreements to convey the very lands affected by such agreements, or lying within the actual locations as aforesaid, and that one or more such deed or agreement has actually been obtained by a certain *Clement Cox*, or under his directions as the agent, or professing to act for the said companies; from all of which, and many other actings and doings of the said companies, and their attorneys, solicitors and agents, to obstruct and hinder your Orator in the enjoyment of its rights, your Orator has reason to believe, and verily believes, that the said companies, or their agents, combining and confederating for the wrongful purposes aforesaid, will endeavor to procure, and are endeavoring to procure, deeds for the said lands, from the very parties to the said agreements, and in violation of said agreements, or to value and condemn them, or have them valued or condemned for the use of the said *Chesapeake and Ohio Canal Company*, so as to hold them free, if possible, from any equitable interest in the same, which your Orator may have acquired under said agreements, and if not prevented, will procure, or value and condemn them, for their own use, and will endeavor to obtain, and will obtain, possession of the very lands affected by such agreements, and will prevent your Orator from taking possession of the same, and will otherwise obstruct and hinder your Orator in exercising its rights under said agreements over the same. And your Orator further sheweth, that having a due respect for, and in all respects obeying the said injunction issued out of *Washington County Court*, it will, during the continuance of said injunction, be restrained

from doing any act whatsoever, to protect the title which it derives under said agreements against said companies, and will, during that period, be left unprotected against the unjust and inequitable attempts of the said *Chesapeake and Ohio Canal and Potomac Companies*, to take advantage of their own wrong, by procuring titles by purchase, location or condemnation, so as to give a priority which they could not have obtained but for the said injunction; that the said injunction has been issued solely to protect an alleged priority or right of election in the said *Chesapeake and Ohio Canal and Potomac Companies*, as set forth in their bill, and not requiring any acts on the part of said companies, such as location, purchase or condemnation, to vest or originate the same, and as the said companies in their said bill of complaint allege, only in order to a speedy determination as to the existence of such priority of right, and that the purposes and objects of said injunction can be accomplished, and full justice done to your Orator, and to the said companies, in the premises, only by restraining the said *Chesapeake and Ohio Canal and Potomac Companies* from doing any act or acts whatsoever to deprive your Orator of the benefit of said agreements, until the question of priority or right as claimed by said companies, shall have been determined upon their said bill of complaint; so that, if said question should be determined against the said companies upon their said bill, your Orator may be remitted to all the rights which it possessed or enjoyed at the time of such injunction obtained, unaffected by any wrongful acts, in prejudice of the same, which the said companies may have done under color of said injunction, and in perversion or abuse of its objects, that thus all the alleged rights and priority of the said companies will be saved and reserved to them from their alleged nature, and by the aid of the above mentioned injunction, to which your Orator is ready to pay all due respect, and all the equities of your Orator will also be preserved and reserved to it, so that in the event of a decision in its favor upon the bill of complaint of the

said companies, it will be remitted to the full enjoyment of them. Wherefore, and forasmuch as without such restriction imposed upon the said *Chesapeake and Ohio Canal and Potomac Companies*, and their agents, your Orator may be thus unjustly deprived of or injured in the possession of said equitable rights, and may thus suffer an injury which cannot be repaired by any decision in its favor upon the bill of complaint of the said companies, and forasmuch as a Court of Equity can alone give relief in the premises, and this honorable court having full jurisdiction co-extensive with the limits of the State, can alone give that speedy, extensive, and efficient relief which the nature and urgency of the case require. To the end therefore, that the said *Chesapeake and Ohio Canal Company* and the said *Potomac Company*, being companies incorporated and organized under acts of the legislature of *Maryland*, may under their respective corporate seals, full, true, and perfect answer make, to all the matters herein before set forth, and that in the mean time the said *Chesapeake and Ohio Canal Company and Potomac Company*, their agents or attorneys, and the agents or attorneys of either of them, and all persons acting or professing to act under their authority or on their behalf, or on behalf of either of them, may be strictly prohibited and enjoined, &c.

On the 24th of the same month, a second bill was filed by the same parties, alleging that, where, from the absence of the owners of the land, over which the road was located, or from other causes, they were unable to make such agreements or contracts as are spoken of in the preceding bill, they were causing warrants to be issued for the purpose of condemning the same, in the manner authorised by their charter, and they asked for and obtained an injunction, to protect them in the rights so acquired.

On the 25th of the same month, they exhibited a third bill, asking to be protected in the rights which they alleged themselves to have acquired, in virtue simply of actual locations for the route and site of the road, independent, either

of contracts with the owners of the soil, or proceedings for its condemnation; and an injunction was accordingly granted and issued for that purpose.

On the 16th of May, 1829, the *Chesapeake and Ohio Canal Company* answered these bills, as consolidated in one suit. The answer stated, that in order more clearly to illustrate the antiquity of their right and title, and of the public recognitions of their right and title, in preference to all other projects of internal improvement, and to the claims and interests of all other corporations and individuals, particularly of the complainants, to appropriate to the construction of the *Chesapeake and Ohio Canal*, and of its incidental works and appendages, the most eligible, proper, and convenient site or route for the canal through the vale of the *Potomac*, from tide water to its highest sources, and especially that identical site and route along the vale and narrow passes of that river, from the *Point of Rocks* where the river passes through the *Kitocton* mountain in *Frederick* county, *Maryland*, to *Cumberland*, in *Alleghany* county, which the complainants have attempted, or now pretend in their said bills, a right to appropriate and occupy for the site and route of their intended rail road, they deem it expedient and proper to submit to the court, a historical deduction of their title, from the inception of the first scheme for improving the navigation of that river by means of a canal or otherwise, to its consummation in the charter, by which these respondents are incorporated, shewing the notoriety of the public and early dedication of the ground in question, to the ends and purposes of a canal supplied by the waters of the *Potomac* and its tributaries; the authentic and binding acts of public authority, and the implied as well as direct pledges of public faith, by which such dedication of the ground in question has been sanctioned and guarantied; and the conclusive, and plenary notice of the same, with which the complainants have advanced their adverse pretensions, and in so doing, have not only unconscionably infringed the chartered rights of these respondents, but have

attempted to overreach, contravene and defeat the high objects and intents of public policy, as authentically declared and promulgated by the most solemn conventions of states, communities, and individuals, and irrevocably established by numerous legislative enactments.

That the improved navigation of the *Potomac*, by means of a canal or otherwise, from tide water to the sources of that river, or at least as high as *Cumberland*, was early considered, before the incorporation of the late *Potomac Company*, and both before and after the revolution, an object of public and national importance; and as such, engaged the active attention of the most eminent statesmen and patriots in *Virginia* and *Maryland*; that immediately after the peace of 1783, it was the first and leading object of public improvement, to which, those states and their principal citizens directed their attention; that the far-reaching views of the eminent citizens, conjointly employed by those states in devising and perfecting the plan of that great improvement, and among the most active and zealous of whom were found many of the most celebrated patriots and warriors of the revolution, contemplated it, even at that early period, as the great channel of commerce and intercourse, which was to connect the original states, with the vast and fertile regions beyond the *Alleghanies*; and that the charter of the late *Potomac Company* was the practical and direct result of those enlarged views and objects, is matter of history; and is more particularly illustrated by the papers and plans of *General George Washington*, by the delegation from the states of *Virginia* and *Maryland*, of that eminent citizen and other most distinguished public men of both states, as commissioners, to consider and report a plan of the work; by the public proceedings and report of those commissioners at *Annapolis*, in the year 1784; and by the concurrent laws of *Virginia* and *Maryland* establishing the late *Potomac Company*, followed up by various acts of the like concurrent legislation, from time to time, enlarging, modifying, or confirming the original charter of that compa-

ny. For authentic copies of some of the preliminary documents and proceedings above referred to, and of all the laws relating to the said *Potomac Company*, these respondents pray leave to refer to the printed collections of the same, annexed to this answer, among the other public and authentic documents hereto annexed, and enumerated in a schedule hereto annexed; all of which they aver to be public and authentic documents, and pray that the same be received and referred to, as part and parcel of this their answer.

It was found, after an experience of between thirty and forty years, that the plan adopted by the late *Potomac Company* for rendering the river navigable, was essentially defective, and wholly inadequate to the great objects for which that company had been instituted; that all their large capital, and the long and arduous labors of so many years, had been expended without attaining the great end of an uninterrupted and safe navigation from the tide water to the source of that river; a failure not originating in any defect of zeal or perseverance, or general intelligence in the conduct of that company, but in the inadequacy of their pecuniary means at the time; in the imperfect state of the science of canalling, and in the general misconceptions of the facilities afforded by the river itself, for navigation, and of the comparative advantages of a continuous canal through the vale of the river, supplied by its own and its tributary waters, and of what is called sluice navigation; misconceptions, common to them, and to the whole *American* community, till the progressive lights of experience and science had subsequently demonstrated the superior advantages of the continuous canal. When this unfortunate result had become evident, the *Potomac Company*, as well as the community at large, began to consider, with an earnestness and solicitude due to the great and extensive interests dependent on the scheme, the means of repairing the original errors in its theory and details, and of reverting to the proper, and now demonstrated plan of a continuous canal all along through the vale of the river, using the waters of the

river and its tributaries as feeders to the canal; a plan entirely within the scope of their chartered powers, and of the original, notorious, and declared ends and objects of their institution; and with this the company connected the ulterior plan to which their chartered limits did not then specifically extend, and the practicability of which, had but recently been thought deserving of further inquiry, (after the report of the *Secretary of the Treasury*, in the year 1808, assuming it to be impracticable for a canal to pass the summit of the *Alleghany*, for want of an adequate supply of water on the summit level,) of effecting a connected canal navigation between the head waters of the *Potomac and Ohio river*. With these views, the late *Potomac Company*, in the year 1819, applied to the Board of Public Works of *Virginia*, to institute, through their principal engineer, the proper examinations and surveys for determining the best mode of improving the navigation of the *Potomac*, and facilitating a communication by way of that river, with the western waters. In consequence of which application, the legislature of *Virginia* passed their resolution of the 8th of January, 1820, requesting the said Board of Public Works, to inquire into the expediency of directing their principal engineer, to examine the waters of the *Potomac*, and to explore the country between the *Potomac and Ohio*, &c. with a view to ascertain and report the practicability of effecting a communication by canals between those rivers; an authentic copy of which resolution is hereto annexed among the said scheduled documents. And the said Board of Public Works did accordingly cause the proper examinations and surveys to be made by their principal engineer, the late *Thomas Moore*, who, in the year 1820 made his official report of the same, which, with the said application from the *Potomac Company*, was officially printed and published in the annual reports of the said Board, and is hereto annexed among the said scheduled documents.

The examinations and surveys of the ground itself, by this practical and gifted engineer, gave results very differ-

ent from those of the report of the *Secretary of the Treasury* above referred to, and which had proceeded upon the apprehension of conjectural difficulties, not brought to the test of professional examination and experiment, as will be evident from a comparison of the two reports.

This report of *Mr. Moore* gave a fresh impetus to public curiosity, and the long talked of plan of a connected navigation between the eastern and western waters, was agitated with renewed interest. Then followed the law of *Virginia*, and the concurring resolutions of the general assembly of *Maryland*, (also annexed among the said scheduled documents,) passed at the December sessions, 1821, of the legislatures of those states respectively, for the appointment of two commissioners on the part of each state, among other things to examine into and report the state of the navigation of the *Potomac*, and to advise and consult as to the measures most advisable to be recommended to, and conjointly adopted by, the said states, either for giving aid to the *Potomac Company* in the further prosecution of the work, or for the more effectual improvement of the navigation of the said river by other means, &c.

The commissioners appointed in pursuance of the said law and resolutions, proceeded in the summer and autumn of the year 1822, to execute their commission in its utmost latitude, with the assistance of the said *Thomas Moore*, the principal civil engineer attached to the Board of Public Works of *Virginia*, and other competent engineers and surveyors. Their joint report of their proceedings, with an appendix of explanatory documents, was duly returned to the respective governors of the two states, in December, 1822, and by the said governors officially communicated to the respective legislatures of those states at the December sessions, 1822, of the same, and were immediately printed and published at public expense, in both states, by the authority of each legislature; and a copy of the same report, &c. was in January, 1823, sent with an official and public communication from the governor of *Maryland* to the president of

the senate of the *United States*, to be laid before the senate pursuant to a resolution of the general assembly of *Maryland*, and was, together with the governor's communication, then immediately re-printed and re-published by order of the senate, among its public documents; each of the printed copies, so printed and published by authority of the legislature of *Maryland*, and of the senate of the *United States*, is hereto annexed among the scheduled documents.

These respondents also refer to the original communication from the governor to the general assembly of *Maryland* at the December session, 1821, and the report of the committee of the house of delegates at that session thereon, as printed and published by authority of said house, and hereto also annexed among the said scheduled documents.

At the same sessions of the two legislatures of *Virginia* and *Maryland*, to which the report of the commissioners was communicated by their respective governors, applications were made to each legislature, by a number of individuals and corporations, acting in concert, for a charter to a new company, in place of the old *Potomac Company*, upon certain terms, for the surrender of the charter of the latter, approved by them. This new charter, connected with a provision for a considerable part of the stock to be taken by each state, was at that time earnestly solicited by the persons principally interested in the scheme; and especially by the three corporate cities in the *District of Columbia*, who deputed proper agents to solicit and advance the plan with the two legislatures. Such progress was made in this matter with the legislature of *Maryland*, that in January, 1823, a bill to establish the *Potomac Canal Company* was reported by a committee to the house of delegates; one of the copies of which, as printed by the authority of the said house, is hereto annexed among the said scheduled documents. But as this was accompanied by a proposition for a large pecuniary contribution from the state, which met with considerable objection and difficulty in the assembly, and without which the friends of the bill did not deem it material to

press the enactment of the charter, that session passed over without any definitive enactment on the subject.

At the contemporary session of the *Virginia* legislature on the 22d February, 1823, an act incorporating the *Potomac Canal Company* did pass; an authentic copy of which is also here annexed among the said scheduled documents. The original bill had been presented to the *Virginia* legislature, and the enactment of it solicited in the same terms as that above mentioned in the *Maryland* legislature, and underwent in its progress, sundry changes and modifications, originating with, and suggested by particular members of the *Virginia* assembly.

About the time that these proceedings were going on in the two state legislatures, the subject was brought before *Congress*, in consequence of sundry memorials from the inhabitants of *Pennsylvania*, *Maryland*, and *Virginia*, and of resolutions moved in *Congress* on the suggestion of certain members of that body. For the progress of that body, in considering the subject and preparing measures for the advancement of the projected canal, in the winter of 1821-2, and the ensuing spring, these respondents refer to the printed and official reports and proceedings of the house of representatives of the *United States*, at the first session of the seventeenth *Congress*, mentioned in the annexed schedule.

Before the sessions of the two legislatures of *Virginia* and *Maryland*, for December, 1823, when the solicitations for the final enactment of the charter were intended to be renewed with unabated activity and zeal, the views of the numerous individuals and communities interested in the business, were considerably extended and improved in the scope and objects of the immediate plan of the canal. The great scheme of a canal, not confined to the *Potomac* region, but forming a connected navigation between the head waters of that river and the western waters, even to *Lake Erie*, had excited such general attention, and so intense an interest throughout the country, that the people of the states of *Virginia*, *Maryland*, *Pennsylvania*, and *Ohio*, and of the

District of Columbia, solemnly appointed numerous delegates from among their most respectable and influential citizens, to meet in convention at the seat of the general government, and there consult and co-operate for the advancement of the common object; this convention held its first session at *Washington*, in November, 1823, and its second session at the same place in December, 1826; the debates and proceedings in both of which were public, and were respectively printed and published immediately after each session of the convention; and an authentic copy of all of which, collected in one pamphlet, containing a second printed edition of the proceedings of the first session, together with the proceedings of the second, printed and published immediately after its adjournment, is hereto annexed among the said scheduled documents.

From the time of the organization of this body, the whole management of the undertaking, the business of maturing its plan, of promoting and soliciting its general interests, and the grant of a charter and public patronage from the several legislatures and governments upon which it more particularly depended, and in fulfilment of the enlarged and beneficial views disclosed in the proceedings of the convention, devolved upon that body, and the several standing committees appointed by, and acting under its authority, as recorded in its proceedings; reinforced by the occasional representations and memorials of the corporate cities in the *District of Columbia*, and the commissioners appointed by the Executives of *Virginia* and *Maryland*, and the *President of the United States*, to open subscriptions for the capital stock of the company, pursuant to the charter finally obtained. The report of the central committee of the said convention, as printed in the aforesaid proceedings of its second session in December, 1826, correctly details the actings and doings of that and its associate committees, and the general objects and results of their labors during the recess of the convention; and these respondents refer to the same, among other of the recorded and published proceed-

ings of the said convention, as part of this their answer. For the further proceedings of the said convention, and its committees, and of other parties interested in the public project of the *Chesapeake and Ohio Canal*, and for the action of the public authorities upon the subject, from the adjournment of the first session of the said convention in November, 1823, down to the passage of the act of Congress of the 24th of May, 1828, authorising a subscription to the stock of the *Chesapeake and Ohio Canal Company*, the respondents refer to all and singular the public proceedings and acts of the legislatures of *Virginia, Maryland, and Pennsylvania*, and of the Congress of the *United States*, and the several committees of those bodies, as recorded and published in their respective journals, reports, documents, and bodies of laws; the whole of which, in any manner relating to the subject of the *Chesapeake and Ohio Canal*, its plan, course, and construction, to its adoption by the public authorities as a work of national import, to the interest taken in it by the several States and the *United States*, to the incorporation of this company, and to all the preparatory legislative deliberations, measures, and proceedings, leading to that act, or consequent to it, these respondents pray may be referred to and taken by this court as part and parcel of this answer, and as public, authentic and notorious, in themselves.

From these documents the respondents deem it material, by way of illustration, here to recapitulate only the following facts, which are verified in detail by the said documents, and are true, and of public notoriety.

At the opening of the first session of the eighteenth Congress, in December, 1823, the *President of the United States*, in his message to Congress, having direct reference to the said convention, and its proceedings in the month of November preceding, mentioned, with decided approbation, the plan of the *Chesapeake and Ohio Canal*, as having been suggested by many patriotic and enlightened citizens, and recommended an adequate appropriation for the employ-

ment of a suitable number of the officers of the corps of engineers, to examine the ground, and report their opinion thereon : and also to extend their examination, to the several routes through which the waters of the *Ohio* may be connected by canals, with those of *Lake Erie*. This, among other important objects of internal improvement, having been thus officially brought before *Congress*, the whole subject was referred to a committee of that body, called the committee on roads and canals, who, at the same session, reported a bill, which was passed on the 30th day of April, 1824, appropriating the sum of thirty thousand dollars, for the purpose of procuring the necessary surveys, plans, and estimates upon the subject of roads and canals.

In the month of May following, the *President of the United States* appointed, from among the corps of engineers and the topographical and civil engineers in the service of the *United States*, a board of internal improvement, with assistants to superintend the execution of the provisions of the said act ; and attached to the said board several officers of the corps of engineers and of the topographical engineers, with sundry civil engineers and surveyors in the service of the *United States*, to perform the practical operations in the field, under the direction of the board. The board was instructed “to make an immediate reconnoissance of the country, between the tide waters of the *Potomac* and the head of steam boat navigation of the *Ohio*, and between the *Ohio* and *Lake Erie*, for the purpose of ascertaining the practicability of a communication between those points, of designating the most suitable routes for the same, and of forming *plans and estimates* in detail of the expense of execution.” The board was also instructed to use every possible exertion, to have their report, on this important line of communication, prepared in time to be submitted to *Congress* at their next session.

These examinations and surveys were prosecuted with the utmost vigor and diligence ; and on the 14th of Febru-

ary, 1825, the *President of the United States* communicated, in a special message, to both houses of *Congress*, the result of the labors of the board and their assistant corps, as far as they had then proceeded, which was immediately printed and published, by order of each house respectively. These operations were resumed and completed under the direction of the board, in the ensuing season, and a detailed report of the same made by the board to the chief engineer, on the 23d of October 1826, which was in like manner, communicated to both houses of *Congress* in a special message from the *President*, on the 7th of December, 1826, and in like manner immediately published and printed by order of each house. These several reports were accompanied by detailed descriptions and surveys, and large maps and profiles, and exhibited with the utmost clearness and minuteness the whole route of the canal from *Georgetown* and the head of the tide water of the *Potomac* to *Cumberland*, and thence to its western termination, the plans and various sections of the canal, the geography and topography of the ground through which it passed, with detailed estimates of its cost, including the section of the canal from the head of tide water to *Cumberland*, and minutely exhibiting its course, and its various subdivisions, and sections, on the western and northern, or as expressed by the engineers, the left bank of the river between those points. The printing of this last report having been expedited by the printers to *Congress* in anticipation of the *President's message*, and of the orders of the two houses, several copies of the same were laid before the said convention at its second session, by direction of the *Secretary of War*; and formed the ground work of the proceedings of that body and its committee, towards a corrected estimate of the cost of the canal; the high estimates of the cost, given by the board of internal improvement, being considered as founded on erroneous data.

During the same session of *Congress*, several members of the *House of Representatives*, considering the disagree-

ment between the estimates of the convention, and those of the board of internal improvement, and the necessity of the most exact preparatory estimates, as well for the success of the various applications to *Congress*, and to the States, for subscriptions to the stock of the canal and other aids, as for the general recommendation of the plan to the public, requested the *President* to submit these estimates to the revision of practical civil engineers, of long tried experience and skill. The *President* accordingly appointed *James Geddes* and *Nathan S. Roberts*, two eminent civil engineers, who, to great professional skill, added a long experience in the practical execution of other works of a similar description, to view and resurvey the route of the said canal, and revise the estimates of its cost. This duty was performed by these engineers with all diligence and despatch; and their detailed report of their surveys and estimates of the same, from *Cumberland*, or about one mile below *Cumberland*, to *Georgetown*, was duly returned to the engineer department, accompanied by detailed descriptions, surveys and maps of the route and site of the canal, between those points.

This last report and its results were largely quoted and commented on, in a report of the committee on roads and canals, in the *House of Representatives of the United States*, on the 11th of February, 1828, which report of the said committee was then immediately printed and published by order of the house, in the due course of its proceedings; and on the 26th of the same month, a resolution passed the house, calling upon the *Secretary at War* for the report at large of the said civil engineers; and the same was accordingly transmitted to the house on the 10th of March following; and then immediately printed and published by order of the house.

And these respondents, further answering, say, that upon the completion of their charter by the act of *Congress* passed on the 3d of March, 1825, assenting to and confirming the acts of *Virginia* and *Maryland*, commissioners were

duly appointed by the *Executives of Virginia and Maryland*, and the government of the *United States*, pursuant to the directions of the charter, to open books for receiving subscriptions to the capital stock of the *Chesapeake and Ohio Canal Company*; and the said commissioners, in pursuance and execution of their appointment and authority, on the 20th of August, 1827, published due notice that such books would be opened at various places in the *United States*, on the 1st of October then next ensuing; which notice was published weekly in various places, at, or as near as practicable, the respective places where the books were to be severally opened; and among others in the city of *Baltimore*, a copy of that published in the *National Intelligencer*, at the city of *Washington*, is annexed; and the others were in the like form, only designating other banks or agents, and other places for receiving the subscriptions in the different sets of books, all to be opened on the same day. The opening of the books had been so long postponed at the request of the central committee of the said convention, in order to obtain, in the first instance, the most satisfactory estimates of the cost of the canal; in the meantime the conflicting estimates of the board of internal improvement and of the said canal convention, were before the public; and the engineers, *Geddes* and *Roberts*, were then engaged in their surveys of the route, and revision of the estimates, whose report, though not then completed, would, as was then well understood, confirm upon the most unquestionable *data* and calculations, the lowest estimates.

Pursuant to the said notice, the subscription books were duly opened on the said 1st of October, 1827, and subscriptions to a large amount were received; a correct summary of the different amounts whereof, at different periods of the 14th day of November, 1827, till the 3d day of October, 1828, is hereto annexed. The subscriptions on the part of the *United States* and of the State of *Maryland*, as authorised by their respective laws, have been duly fulfilled upon the conditions respectively prescribed by them, and were made

at the respective dates mentioned in the said summary. Notwithstanding the subscriptions amounted, so much sooner, to the one-fourth of the capital stock required by the charter, to give immediate effect to the incorporation of the company, it was deemed advisable to postpone a call of the stockholders for the election of the president and directors, in the certain expectation, of an act at the then ensuing session of *Congress*, authorising a subscription on the part of the *United States*; and in order to give an opportunity to *Maryland* and the *United States*, on the completion of their respective subscriptions, to vote at the said election, and on other matters to be brought before the meeting. The said commissioners, accordingly, on the 5th day of March, 1828, called a meeting of the stockholders for the purpose of electing their president and directors on the 7th day of April then next ensuing; by which day it was expected the two subscriptions, just mentioned, would be completed, by means of a bill then pending in *Congress*. But some unexpected delays in the passage of this bill occurring, the call was postponed; and on the 26th day of May thereafter, (the said bill authorising the subscription of one million of dollars, on the part of the *United States*, having passed on the 24th of the same month,) the call was renewed, and the general meeting of the stockholders appointed for the 20th of June, 1828. These calls of the general meeting of the stockholders, and the intermediate postponement of the first, were duly published by the said commissioners in several public prints or newspapers, at various places in the *United States*, and among others at the city of *Baltimore*, pursuant to the directions of the charter; copies of which as published in the *National Intelligencer*, at the city of *Washington*, are hereto annexed. Pursuant to the last of the said calls, the stockholders assembled at the *City Hall*, in the city of *Washington*, on the 20th day of June, 1828, and duly elected their president and directors, who were immediately organized according to law; and have ever since been diligently

engaged in prosecuting the execution of the canal, pursuant to their charter, with all practicable vigor and despatch.

The *Potomac Company*, by their several authentic and valid acts, in their corporate capacity, on the 16th of May, 1825, the 10th of July, 4th and 15th of August, 1828, duly declared their assent to the provisions of the said charter of the *Chesapeake and Ohio Canal Company*, in the manner prescribed by that charter; and duly surrendered their charter, and conveyed, in due form of law, to the *Chesapeake and Ohio Canal Company*, all the property, rights and privileges by them owned and possessed under their charter, which surrender and transfer were duly accepted by the *Chesapeake and Ohio Canal Company*; true copies of all which several acts of the two companies are hereto annexed as part of this answer.

The last named company, also at their said general meeting in June, 1828, and at several adjourned meetings of the same, in June and July of that year, adopted, and passed, among others, the several resolutions, by-laws, and regulations, printed copies of which are annexed among the said scheduled documents; and, among these, the annexed resolution adopting the route and site of the canal surveyed and laid down by the *United States' Engineers*, and by Messrs. *Geddes and Roberts, &c.*

Among the works done under the orders of the president and directors, since the organization of this company, they have caused detailed plans of their canal to be surveyed and laid down by their engineers in a practical form for contractors, upon the route before surveyed and laid down under the direction of the said Board of Internal Improvement, and by Messrs. *Geddes and Roberts* as aforesaid, from *Georgetown*, in the *District of Columbia*, to *Williamsport*, in *Washington county, Maryland*; and for the distance of about forty-eight miles from *Georgetown*, up to within about a half mile of the *Point of Rocks*, or foot of the *Kitoctin* mountain, the canal has been actually put under contract for execution upon these plans; and the work was

actually commenced by the contractors in September last, has ever since been diligently and efficiently prosecuted by them, and such progress made in it, as leaves no rational doubt of its completion, upon the most enlarged scale and improved plan contemplated by its projectors, far within the time prescribed by the charter ; and the said president and directors would, before now, have had at least so much more of the said canal, as the section from the *Point of Rocks* in *Frederick*, to *Williamsport* in *Washington*, under contract and in actual progress, but for the interruptions thrown in their way by the complainants, on the route from the former point to *Cumberland*. The respondents, by way of further illustrating the plan and route of their canal, refer to the annexed copies of the plans and surveys of the same from the said *Point of Rocks* to *Williamsport*, executed by their engineers ; which they pray may be taken as part of this their answer.

As to the pretensions of the complainants to interpose and oust these respondents of their priority of selection, and their vested right in the route of their canal, and to intrude the rail road of the complainants upon the same, these respondents say, the legislature of *Maryland* never contemplated, by the charter granted to the complainants, any interference with the route selected for the canal, as if these be involved in the terms of that charter any covert or latent construction or operation in practice, authorising such interference, (which these respondents are well advised there is not,) and if the parties, who projected the said rail road, and actively promoted and solicited, and finally obtained, and now enjoy the charter for the same, originally intended that any such latent construction or operation in practice should be involved in its terms, with a premeditated design to press the advantage of such in their future operations under their charter, (which these respondents by no means charge, but, on the contrary, presume the said parties were at the time direct and sincere in their professed object and in the ostensible purpose and intent

for which they solicited their charter,) then it would be manifest, that the legislature and people of *Maryland* were misled and deceived into the grant of a charter for the said rail road, contravening the well known views, and established policy, and interests of the state, long avowed and practically acted on by the legislature, and the solemn faith and compacts of the state, as well with her co-sovereigns *Virginia, Pennsylvania, and the United States*, as with the *Potomac Company*, with the *Chesapeake and Ohio Canal Company*, and with the public at large. For not only was any intent, (if it existed) to supersede or interfere with the proper route and site of the canal, and occupy the same with the said rail road, kept out of view, and reserved and concealed in the minds of the parties who solicited and obtained the rail road charter, but it was studiously and elaborately masked, by their openly professing and setting up a different and shorter route for the rail road than any practicable route for the canal, and upon this very difference in the routes, they valued themselves, as having projected an improved mode of intercourse with the west, very superior to the canal.

The project of the said rail road was originated, and set in motion at a meeting of a number of the citizens of *Baltimore*, held at that city, on the 12th and 19th of February, 1827: the proceedings of that meeting, with a report of a committee unanimously approved by the meeting, were printed and published by its authority; the whole train of the elaborate reasonings of which, tends to establish two points; 1st. The intrinsic advantages, in point of expedition and convenience, of a rail road over a canal; 2dly. The particular advantages of the projected rail road from *Baltimore* to the *Ohio*, over the *Chesapeake and Ohio Canal*; among the most decided of which was, that the former was to reach the western trade, by a different and shorter route. Upon this latter point the most minute calculations are made, of the differences, in distance and time, between the known route of the canal and the intended route of the rail road.

The direct route, proposed for the Rail Road, as contrasted with the circuitous route chosen for the canal, was vauntingly printed in capitals, and its various advantages reiterated in every form calculated to illustrate the superiority of the rail road over the canal. The charter of the *Rail Road Company* was immediately solicited, and obtained of the legislature of *Maryland*, then in session, by the committee or some of them, named in the said printed proceedings; the pamphlet containing the said proceedings was circulated among the members of the legislature, and the same topics were enforced and illustrated by the committee, in the course of their solicitations. All the active and influential persons, composing the said meeting, and its committees, became members of the corporation, when the said *Rail Road Company* became incorporated, and the president and directors of that company were chosen from among the same description of persons, and so continued to the time of the filing of the complainants' said bills, and yet so continue, as these respondents are credibly and certainly informed, and do verily believe. One of the said pamphlets, so published by the said meeting, or by its committee, is hereto annexed among the scheduled documents; and to that, as well as to the representations and memorials of the said rail road committee to the legislature, and the proceedings of the legislature thereon, preparatory to the grant of the said rail road charter, these respondents pray that reference may be had, as part and parcel of this answer.

These respondents are further credibly and certainly informed, and verily believe, that not only was all idea of any interference with the site or route of the canal kept out of view, and masked by the *general* proposition of a different route for the rail road, studiously impressed on the legislature, and promulgated to the public, as one of the pre-eminent merits of the rail road project, but that the said parties, so engaged and interested in that project, and in the promotion of it as aforesaid, and now claiming the benefits of the charter for the same, did, both before and after the

grant of that charter, and while the same was in a course of solicitation before the legislature, and down to a period considerably posterior to the subscription of the stock, and the formation of the company, even specify the difference between the two routes, both to the members of the legislature, and otherwise, to the public; that is, a direct route from *Baltimore* to the *Ohio*; cutting down the hills between *Baltimore* and the *Monocacy* 50 or 60 feet, by machinery, and forming an inclined plane to the *Monocacy*; and then crossing the mountains in the direct route to the *Ohio*, by a number of stationary steam-engines, computed at the number of a hundred; that afterwards, in the winter of 1827–8, when the complainants were soliciting of the legislature the law authorising a subscription on the part of the State to the rail road stock, the president of the said *Rail Road Company*, in behalf of the company, assured the members of the legislature, and especially the members from the western counties, that the rail road would pass by *Westminster*, through *Harman's* gap to *Williamsport*, and actually accepted the services of *Mr. James Johnson*, of *Frederick*, to explore the mountains on that route; that the said parties, on all these occasions, and continually, until they formed their sudden resolution, in May, 1828, to pounce upon the route and site chosen for the canal, publicly and distinctly disclaimed any rivalry or interference with the canal; and gave out that the comparative directness and shortness of the route of the rail road, and its other advantages, would place it above all competition from the canal. If on the other hand, the new route now proposed for the rail road, and the idea of ousting the *Chesapeake and Ohio Canal* of its chosen and proper route were after thoughts, originating with the complainants, or suggested to them, after their organization as a body corporate under their charter, then it is equally a perversion and abuse, in practice, of the original and genuine intent of their charter, and the privileges which that instrument was designed to confer on them. These respondents are not certainly or

precisely informed at what time such change in their views was effected, or upon what ostensible grounds; but these respondents have good reason to think and believe, and do verily think and believe, that it was not until after the advertisements of the said commissioners, notifying a call of the stockholders of the *Chesapeake and Ohio Canal Company*, and the near prospect of large subscriptions to the stock of that company, from the State of *Maryland*, and the *United States*, gave sure promise of its speedy and efficient organization, and suggested to the complainants the policy of some bold and extraordinary measures to defeat it. The actual operations of the complainants, through their agents, in appropriating to themselves the route and site chosen for the canal, did not commence, as these respondents have good reason to believe, and do verily believe, and so far as they have been able to ascertain from the documents and exhibits of the complainants, or other evidence, till some time about the middle of May, 1828.

These respondents are further credibly and certainly informed, and do verily believe, that the real tendency and effect of those operations, as an adversary interference with the canal, were studiously masked and concealed by the complainants and their agents; and that they pushed them on with unusual and otherwise uncalled for hurry and precipitation, for the direct and concerted purpose of completely forestalling the chosen and well known route and site of the canal, before any of the persons materially interested in the conservation of its rights could have notice; and with such views and intents, that the agents who were employed by the complainants in making their locations of the rail road on the route of the canal, gave out to the people in the neighborhood who witnessed their proceedings, that they were merely making experiments, and intended no interference with the canal; and some of the persons with whom contracts were made for cessions of their lands, were also informed by such agents, that the only intent and effect of such contract, were to give permission to the sur-

veyors of the rail road to pass through. So much, however is certain, that it was not till about the 7th of June, 1828, that the persons principally concerned in the conservation, *ad interim*, of the rights and interest of the canal, (as the said central committee, the said commissioners appointed to open subscription books, and call the first meeting of the stockholders, the *Secretary of the Treasury* representing the interest of the *United States* in the stock of the company, and other principal stockholders,) received with the utmost surprise the first information that the agents of the complainants were proceeding with the utmost haste and secrecy in an attempt to forestall the chosen route and site of the canal, by making their surveys upon the most important and indispensable parts of it, and taking up the ground by contracts, with the adjacent proprietors. Measures were immediately taken at *Washington*, by the persons principally interested, and with the concurrence of the *Secretary of the Treasury*, to despatch proper agents, and counsel, to ascertain the true state of the case, and to take the proper measures for the protection of the rights of the *Canal Company*. The bill of injunction in the name of this company, and of the *Potomac Company*, against the now complainants, &c. in *Washington County Court*, and the injunction thereon grounded, on the 10th of June, 1828, to which the complainants have referred in their said bills, were the result of those measures. To that bill, a copy of which is hereto annexed, these respondents also refer, and pray that it may be taken as part of this answer, now here re-asserting the material facts therein stated, and all the rights and immunities therein claimed and asserted on behalf of this company; of all which, they pray that they may have the like benefit, as if ever so formally averred or pleaded in this answer.

These respondents further answering say, that at the *Point of Rocks* where the *Potomac* intersects the ridge of the *Kitoctin* Mountain, and where the pretended route of the said rail road is described by the complainants in their

said bills, to strike the *Potomac* river, there is one of those narrow passes in the exact route and site of the canal as officially and definitively selected, surveyed, and laid down as aforesaid, which presents no choice of ground for the canal; but where for a considerable distance up the river along the foot of the mountain and its spurs, the canal is confined by the nature of the ground within certain primeval and unremovable barriers; as is more particularly shewn and illustrated by the topographical descriptions, maps and profiles of the engineers, herewith exhibited, and above referred to. Through the whole of this pass, the space between the jutting and precipitous rocks on the one hand, and the river on the other, is so narrow, that in order to obtain the proper and necessary breadth for the canal and its towing path, a solid and wide wall must be constructed in the river; and if the canal be intercepted and cut off by the rail road, or otherwise, from that single route through this pass, it must be completely intercepted, and cut off from the whole of its route above, and be either entirely stopped and defeated, or compelled to the precarious, dangerous, and enormously expensive, and every way inconvenient and burthensome expedient of crossing to the opposite side of the river on an aqueduct, and then in order to regain its route to its western terminus, of re-crossing the river on another such aqueduct, at such unknown and uncertain point above, certainly not lower than *Cumberland*, as where it may please the complainants to allow them verge and space enough. Through all the space between these two points on the southern and eastern bank of the river, these respondents will then have to explore a new route and site for their canal; all the elaborate reconnoissances, surveys, maps, plans, &c. by which the present and appropriate route and site of the canal have been determined; all the estimates already made of its cost, inseparable as are their *data* from the localities of the actual route and site of the canal so determined, and upon the faith of which, and of the already ascertained practicability of that route,

the subscriptions to the stock of the canal have been made; all the labors and expenses of years consumed by the engineers of the *United States*, and of this company and their co-adjutors, in ascertaining these results, must then be utterly wasted and thrown away, and the whole progress be gone over again, on the opposite side of the river, at an immense increase of expense, and loss of time to the said *Canal Company*, and to the utter peril of the franchise bestowed on them by their charter, and every way to their inconvenience and oppression. Besides, if it were possible (which it is not,) for the said *Canal Company*, after deserting their appropriate route as already specifically selected, surveyed and laid down, and conceding to the rail road the choice of the site next the river, at any labor or expense, within the reasonable compass of human means, and at all commensurate with the object, to lay off and conduct the canal out side of the rail road, by cutting down the sides of the mountains and rocky precipices, that bound their operations through the said pass, and through many other narrow and difficult passes of a like description, and presenting some of them equal, and others nearly equal difficulties on the route in controversy from the *Point of Rocks* to *Cumberland*, to the proper level, and of the proper breadth for the canal and its towing path, so as to keep the canal on the same side of the river, with the rail road interposed between it and the river, all the way between those points, still the inconveniencies and impediments to the proper construction, supply and use of the canal, would be immense and incalculable, if not insuperable, by its being cut off and intercepted in so great a portion of its route, from its cognate source and appendage, the river, and the numerous and necessary feeders and communications between it and the river, the frequent and continually recurring necessity of such communications throughout that route, being indispensable alike to the proper construction of the canal and its appendages, as to the purposes of its intercourse, commerce and navigation, for which alone, it was

and is designed. The above mentioned pass at the *Point of Rocks*, and for some distance above the point so called, is not the only one of that description, and presenting the like narrow and difficult bounds to the canal, on the route in controversy, from that point to *Cumberland*; but there are numerous others on that route, where the *Potomac* breaks through the numerous ridges, mountains, and rocky precipices, where it is hemmed in by rocky and high banks, with a very narrow space between, and where in some instances equal, and in other instances nearly equal difficulty, labor and expense, to open and improve the site for the passage of the canal and its appendages, occur as at the *Point of Rocks*, as is more particularly shewn and illustrated by the documents above referred to, and cited for the topography of this last mentioned pass.

These respondents submit to the equity and discretion of this court, that even if originally, and by virtue of their prior grants and franchises, they had no priority of right to the choice and selection of the route and site of their canal, along the margin and bank of the *River Potomac*; if no authorised, determinate, and binding selection and designation of such route and site had been made, and if the complainants stood on a foot of perfect equality as to the date and origin of their franchise, still the preferable right of this company to conduct and construct their canal on the route and site in controversy, is just as absolutely determined by a concurrence of equitable and cogent circumstances, by the intrinsic qualities and faculties of these two works, and by their respective relations to the means, the objects, and the uses of their construction, and to the nature of the obstructions and public inconveniencies which they are designed to remove by artificial means. Because, according to the complainants' own shewing, and the facts are otherwise true and notorious, they have the choice of two, or more, practical routes for their rail road, without any interference with the canal, or connexion with, or even approximation to the river; the different routes only present-

ing some differences in the comparative labor and expense of construction; and these compensated, if they occur with any considerable increase on the more northern route originally proposed for the rail road, by the advantages and savings from directness of course and shortness of distance, as the principal and leading personages, both among the original projectors, and promoters, and the present managers and proprietors of the rail road, have repeatedly averred, and publicly contended; the principle and the operation of the lifting power of stationary steam engines, by which the rail road overcomes ascents, and gains new levels, admit of an infinitely greater diversity and extent of application than that of the canal, circumscribed and limited as it is, by water levels, and are perfectly practicable and convenient, and within the ordinary compass of that power, either to overcome all the necessary ascents on the more northern and direct route first proposed for the said rail road; or if what the complainants designate the southern and circuitous route be preferred by them, to assume with ease and convenience, a higher level than the canal on that route, and leave the canal ample verge and room between the rail road and the river, there is no necessary or proper connexion or dependence between the rail road and the river, either intrinsically, as regards the construction, appendages, and uses of the rail road, or relatively as regards the purposes of intercourse, trade, and commerce, which the rail road was designed to subserve; whereas the river is, as it were, the life-blood of the canal; and continual access and frequent communication from the one to the other, are inseparable from the very idea of the canal; and lastly, the complainants, before they took any step towards a change of their original route, for the one now in controversy, or towards any claim or appropriation of the latter, or even contemplated any such change, claim or appropriation, had the most ample, direct and conclusive knowledge and notice of all the steps that had been taken to designate and appropriate this same route for the canal, they had the most cer-

tain knowledge that every procedure, practicable in the nature of things, had been adopted to consummate and render effectual such designation and appropriation for the canal route and site, both before and after the consummation of the charter to the said *Canal Company* by the passage of the act of *Congress* confirming it, and before the charter to the *Rail Road Company* was either enacted or projected; and that such designation and appropriation of the route and site of the canal, its ascertained practicability and facilities of execution on that route, and the estimates of its capital and cost, which were founded on the local circumstances of that route, all entered into the considerations, motives, and terms of the charter, and more distinctly of the subscription to the capital stock created by it; and with the entire notice and consciousness of all these circumstances, the complainants, at the very moment when they perceived that the said *Canal Company*, then legally constituted a body corporate, were just coming into the actual fruition of the right thus claimed and secured to them, took advantage of their want of executive organization to forestall and oust them of that right, under the naked pretext that the proprietary right and title of the lands necessary to be purchased or condemned of individuals, had not been technically vested in the company. But these respondents are well advised by counsel, that they may lawfully and of right maintain before all courts of law or equity, and in all other places whatsoever, and they do now here maintain, that independent of any prior and specific location, survey, or appropriation, of any precise site or route of the canal, there was originally vested in and guarantied to the late *Potomac Company*, by virtue of their charter, the exclusive privilege, use and property, of the entire stream, bed and channel, of the river *Potomac*, with its branches and tributaries, and whatsoever as part, parcel, or appendage of the river, constituted any part of the public domain from tide water to the highest place practicable for navigation on the north branch of that river; and over and above these, the prior and exclusive

election, pre-emption and appropriation, by the prescribed modes of purchase or condemnation from all the adjacent lands of the individual proprietors, all along the banks, cliffs and low grounds contiguous to the river, and within the proper sphere and compass of any of the authorised operations of the company, of the proper ground for the route and site of the canal or canals, and the auxiliary works and appendages of the same, and of the materials for the same, contemplated and authorised by that charter; that this exclusive right and priority of election, pre-emption and appropriation, extended to all the lands of individuals and public domains within the precincts of any of the actual or possible operations of the said company, authorised by their said charter; and that within those precincts no other corporation in present or future existence, nor any other description or body of men whatever, collectively or individually, had or could acquire any right or title under any pretence of a right of way, road or improvement whatsoever, public or private, in any manner to restrict or confine the said *Potomac Company*, or their authorised operations under their charter, to any one among any possible number of locations or sites, or in any manner to diminish or circumscribe their free choice and election of the same; far less to exclude them from priority in the choice and election of the only, or of the most eligible, practicable, and convenient, and still less of previously elected and designed locations or sites, for the proper execution of the works authorised by their charter. That all these rights and privileges, in all their integrity, force and efficacy, have been and are duly and indefeasibly transferred to and vested in these respondents, by virtue of their said charter, and of the surrender and transfer to them from the late *Potomac Company*; with such extensions and modifications as the terms of this new charter and the extended and improved scheme and plan of the works thereby authorised, prescribe or require. That independent of any proprietary rights or corporate privileges and immunities specifically derived by these re-

spondents from the late *Potomac Company*, all the rights, privileges and immunities herein before described or mentioned, as vested in or guarantied to the *Potomac Company*, and all the analogous rights, privileges and immunities, enlarged and modified in conformity to the scheme and provisions of the new charter of these respondents, and to the more extended and comprehensive plan of the works and improvements thereby authorised, were and are indefeasibly vested in and guarantied to these respondents by the sole force and effect of their own charter. That the charter of the said *Rail Road Company* does not, and of right could not, in terms, abolish or take away, or in any manner diminish or alter, in the whole or in part, either of the prior charters to the said *Potomac Company*, and to these respondents, or any of the corporate rights, privileges or immunities expressly granted or necessarily inferred from the said prior charters or either of them; and that neither of the said charters, nor of the franchises thereby created, can be abolished, taken away, or in any manner altered or diminished by implication; even if the legislature of *Maryland* were competent, which it was not, when the charter to the *Rail Road Company* was granted, to pass any law or grant any charter, or any right, title, privilege or authority, to be exercised under such law or charter, abolishing, taking away, or materially diminishing the said prior charters, or either of them, or any of the rights, privileges or immunities by them, or either of them, communicated to and vested in these respondents. That the charter granted to these respondents, as well as that to the late *Potomac Company*, being in the nature not only of a contract between the sovereign parties to it on the one hand, and the members of the body corporate thereby created on the other, but of a solemn and binding compact between those sovereign parties themselves, was, and is, altogether irrepealable and indefeasible, in the whole, or in any part, by either of these parties, without the concurrence of all; or by all without the assent of the corporation in which the rights, privileges

and immunities granted by such charter, are vested and reside. That the said charter of the complainants, and the authority exercised, or pretended to be exercised under it, in so far as the same purport, or are, or may be construed and executed in derogation of the corporate rights, privileges or immunities granted and vested by the said prior charters, or either of them, are repugnant to the constitution of the *United States*, and utterly inoperative and void; and lastly, that whatever the abstract right of prior choice and election claimed by these respondents in other possible routes or sites for their canal, and the incidental operations authorised by their charter, the ground designated for the route and site now in controversy, has been effectually elected and appropriated by these respondents to the exclusion of the complainants: of all which matters, these respondents crave all the benefit and advantage in this answer, that they might or could have had in any form of equity pleading whatever.

Of all the documents of title under which the complainants pretend a claim to the route and site in controversy for their rail road, and to the lands in controversy, as referred to, and it is presumed, filed with their said bills, these respondents or their counsel have only examined such, as were filed for enrollment in the clerk's office of *Washington* county, *Maryland*, as late as the 10th of June last, and the clerk's office of *Frederick* county, as late as the 11th of the same month; and the agreements with *Henry* and *Frederick Delinger*, filed in this court with the complainants' bills against those persons, in the same month; the documents so examined, comprehend, as these respondents are credibly and certainly informed, and verily believe, the whole of the said pass at and above the *Point of Rocks*, and some other of the like narrow and difficult passes on the route in controversy, and the identical route and site elected, designated and surveyed for the canal as aforesaid; and as to all the other documents of title set up and pretended by the complainants in the said bills, and therein referred to, as exhibits,

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such as deeds, agreements, locations, and specifications of locations, warrants for condemnation, &c. these respondents are not more particularly informed of their nature or authenticity, than what they collect from the allegations of the complainants in their said bills, and from careful inquiries in the country, into the nature and extent of the ground, covered by the claims of the complainants, in virtue of those documents, without any actual inspection of the documents themselves; and therefore, for greater certainty, they refer to the said documents, and exhibits themselves, and the authentication of the same; all of which, or office copies of such of the same as have been duly recorded, these respondents presume, are, or ought to be filed, as the exhibits referred to, by the complainants in their said bills. The ground, which these documents import, an intent to bargain or sell, or appropriate, or in any manner to affect by location or condemnation, and which the complainants now claim in virtue thereof, for the route and site of the said rail road, throughout the whole extent of that ground upon or towards the line of the river *Potomac*, includes the identical route and site selected, designated and surveyed for the said canal as aforesaid, and all the slight variations of the same in the several reconnoissances, surveys, and locations made of the same as aforesaid; and every other practicable route and site for the canal and its appendages on the hither side of the river, from the *Point of Rocks* to *Cumberland*; or if there be any gap in those pretended appropriations of such ground for the rail road, where the ground designated for the route of the canal is not covered by that claimed under those documents, it would be rendered utterly useless and impracticable to these respondents, if the actual claims of the complainants were allowed, but whatever may be the local extent of the ground so claimed by the complainants in virtue of their said pretended locations, and appropriations of the same, the complainants, in their said bills, are understood to claim, as the fact is otherwise certain, that it comprehends the whole of the said pass at

and above the *Point of Rocks*, and all the most difficult of the other narrow passes above described as on the route in controversy; and without the possession of which these respondents would be compelled to abandon the whole of the designated route of their canal, without having left to them any practicable route for the same on the hither side of the river.

The ground so claimed by the complainants in virtue of the several titles and documents referred to in their said bills, extends to the river *Potomac* itself, comprehending whatever of its margin and water may appertain to the lands, or rights of the individual proprietors; and in conducting the said rail road through several of the narrow and difficult passes above mentioned, the complainants would have to construct walls in the bed of the river, in order to get the proper breadth of their road, in like manner as these respondents would have to do for their canal, at the same places; and these respondents have no doubt it is the plan of the said rail road, as devised and specified by the engineers of the complainants to construct such river walls.

These respondents do not know, admit or believe, that the complainants, had caused any comparative or experimental examination of what, in their said bills, they have described as the southern route for their said rail road, that is, of the route in controversy from the *Point of Rocks* to *Cumberland*, or any part of it, to be made, or that there was any recommendation of that route, founded on any preliminary examination of the same by their engineers, when they determined upon the attempt, in direct and concerted hostility to, and derogation of, the rights of these respondents, to adopt and appropriate that route to themselves, and commenced their operations in May, 1828, for the location of their road on that route, and the appropriation of the ground constituting the route and site of the canal as aforesaid; but these respondents are credibly and certainly informed, and do verily believe, that without any previous examination of that route by their direction and authority,

they suddenly despatched their agents, attorneys and engineers, sometime about or after the middle of May, 1828, (as to the precise time these respondents for greater certainty, refer to the documents of title, whether the deeds, agreements or warrants, exhibited with the said bills of the complainants,) to seize upon the said route by the means set forth in their said bills; and that, without any previous survey, or examination whatever, of the route on their part or behalf, they made their pitch at once, and in the first instance, upon the narrow and difficult passes above described on that route, "and wherever the character of the ground was such (according to the description of it by the complainants in the said bills,) as to leave but little choice in the location of the said road," and of course, no choice in that of the canal; that these measures were pursued with the most extraordinary and precipitant haste; their agents riding about and ranging the country with ceaseless activity day and night, hunting up the proprietors of the ground on the route, and soliciting from them cessions for the rail road; and with such anxious vigilance and activity, and celerity of movement, were all their operations for the location of the site of the rail road, and for taking up and forestalling the proprietary rights in the ground, conducted by the agents of the complainants, and the officers of the *United States* serving them as engineers, that the party more resembled a partizan corps meditating or guarding against surprise, on the flank of an enemy, than persons engaged in the ordinary business either of contract or of civil engineering.

The engineers who were employed by the complainants on that service, were enabled to perform such of the said operations as fell to their share, (and they were not confined, as these respondents are credibly informed and believe, to operations within the ordinary sphere of engineers, either civil or military, but extended to solicitations and negotiations with the individual proprietors, for cessions of their lands,) with so much the more ease and despatch, as most of them had before been attached to the said board of inter-

nal improvement, and actually engaged under the direction of that board in the reconnoissances and surveys of the route of the *Chesapeake and Ohio Canal*, and in making up the memoirs, topographical descriptions, drawings, maps, and profiles of the route and plan of the canal as above stated, of which or of the geographical and topographical details and information derived from which, they made free and frequent use (as these respondents are further credibly informed and verily believed,) in their locations of the said rail road upon the said route; and these respondents have the strongest reason to think and believe, and do verily think and believe, that the complainants were urged to the instant commencement of these operations, and to the extraordinary haste and precipitancy with which they pursued them, entirely by the near prospect which they perceived of an organized board of president and directors for the efficient management of the affairs of the said *Canal Company*, and by a design to forestall, and defeat the expected operations of that board, to secure, by purchase or condemnation, the ground already designated and selected for the route and site of the canal.

In further confirmation of what these respondents have already averred, the full and detailed knowledge and notice of the long standing, authentic and notorious election and appropriation of the route and site in controversy, for the canal, and of all the steps that have been taken to mark it out, and set it apart for that purpose, and how completely it had been incorporated and identified with the whole scheme and plan of the canal; with which knowledge and notice, the complainants, and their agents and engineers, commenced and carried on all their said operations to counteract and defeat these respondents, in the fulfilment of the great public and beneficial ends and objects of their institution; and in order more clearly to illustrate the inequitable use and application made of such knowledge, which, instead of serving as a protection to rights, the existence of which is communicated, was laid hold of, and used to overreach and

defeat those rights ; and how unscrupulously, in other respects, the very instruments and means dedicated to the advancement and execution of the scheme of the canal, have been converted into the instruments and means of the most deadly attempts against its vital interests, and the interests of the identical parties, who have provided those same instruments and means, and lent the aid of them to the complainants for a very different purpose ; these respondents say, that of the nine delegates from *Baltimore* to the said *Canal Convention* in December, 1826, eight of them were prominent and active members of the said meeting at the city of *Baltimore*, when the project of the said rail road was set on foot, and of the committees appointed by that meeting ; and six of those eight actually attended the said convention, and took part in its deliberations and proceedings, as will more particularly and at large appear, by a reference to the above mentioned proceedings of the said *Baltimore* meeting and *Canal Convention*, one of them was appointed the president of the said *Rail Road Company* at their first election, and has ever since continued so ; and was also appointed by the executive of *Maryland*, one of the commissioners to open the subscription books for the capital stock of the said *Canal Company* ; and others of the said delegates were, it is believed, appointed directors of the said *Rail Road Company* ; that the board of engineers, officiating for the said *Rail Road Company*, was always, and yet is in part composed, and their corps of field engineers was always, and yet is entirely composed of officers belonging to the several corps of engineers, and of the army of the *United States*, and of the civil engineers in the service of the *United States* ; all of whom were lent by the government of the *United States* to the complainants, to perform the scientific operations necessary to execute their then supposed plan of a rail road ; and it is understood, the complainants enjoy the services of these engineers at public expense ; that any idea of interference between the rail road and the canal, was then, and ever after, till the above

mentioned intelligence reached and surprised the *Secretary of the Treasury* in June last, the remotest imaginable from the mind of the government, and was necessarily known to the complainants to be so: that of the various descriptions of engineers, so borrowed by the complainants from the public service, six had been before employed and actively engaged, under the above mentioned board of internal improvement, in the identical reconnoissance, surveys, &c. &c., of the route of the *Chesapeake and Ohio Canal*, in the years 1824, 1825 and 1826, communicated by the *President to Congress*, and published as above mentioned; all which will more particularly and at large appear by reference to the already recited reports of the said board of internal improvement; and to the annexed document, certified from the *War Department of the United States*, containing the roll of the engineers detached from the public service, for the service of the complainants, with the orders from the chief engineer of the *United States* to the three principals among them; and also the roll of the various engineers in the service of the *United States*, constituting the said board of internal improvement, and its assistants, and the corps of engineers, of various classes actually employed, under the direction of that board in the various reconnoissances, surveys, &c., &c., of the route of the *Chesapeake and Ohio Canal*.

Now these respondents, as further advised by their counsel, and further answering, say, that by the pretensions set up by the complainants in their said bills, to oust and deprive these respondents of the route and site for their canal, here in controversy, and to intrude the said rail road upon the same, by the retrospective operations and effect of the rail road charter, or any other statute of *Maryland*, or of any other State, and in virtue of the pretended authority, which the complainants assert and exercise under the said State, and their charter from the same, as set up and asserted in their said bills, there is now here drawn in question, the construction of the constitution of the *United States*, and

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especially of that clause of the same, whereby it is ordained and established, that no State shall pass any *ex post facto* law, or law impairing the obligation of contracts; and of the several statutes of the *United States*, to wit, the act of *Congress*, passed on the 30th April, 1824, appropriating thirty thousand dollars for the purpose of procuring the necessary surveys, maps, plans and estimates, upon the subject of roads and canals, &c.; the act of *Congress*, passed on the 3d March, 1825, confirming an act of the legislature of *Virginia*, incorporating the *Chesapeake and Ohio Canal Company*, and an act of the State of *Maryland* confirming the said act of *Virginia*, &c.; the act of *Congress* passed on the 23d May, 1828, to amend and explain the two last mentioned acts of *Maryland* and *Virginia*, &c.; and the two acts of *Congress* passed on the 24th May, 1828, the one authorising a subscription to the stock of the *Chesapeake and Ohio Canal Company*, the other enlarging the powers of the several corporations of the *District of Columbia*, and for other purposes; under which said clause of the constitution of the *United States*, or under such other clause or clauses, and provisions of the same, as apply to, and operate on the case, and under which said statutes of the *United States*, or under such of them, and such parts of them, as apply to and operate on the case, these respondents, in virtue of their aforesaid charter, and of the several statutes and acts of *Virginia*, *Maryland*, and the *United States*, constituting such charter, or altering or amending the same, or anywise relating to the same, and in virtue of the rights and interests thereby, and by the authority of the same, vested in these respondents, do now here before this court, set up and claim their prior and preferable title, right and privilege, to construct their said canal, and its incidental works and appendages, on the precise route and site designated for them as aforesaid, and now in controversy; and to appropriate by the prescribed modes of purchase or condemnation, the lands and tenements in controversy, on, and near that route and site, and through which the said canal

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is intended to be conducted, and the necessary materials found on such lands, for the construction of the said canal and its incidental works and appendages ; and these respondents do now here set up, and claim before this court, under the constitution and statutes of the *United States* aforesaid, and in virtue of the rights, interests and authority, by force of the said statutes, and of the other laws aforesaid, vested in these respondents, an exemption of such, their prior and preferable title, right and privileges, aforesaid, from the operation and effect of the charter granted to the complainants as aforesaid, and of the pretended authority set up, asserted, and exercised under the same as aforesaid ; and from all diminution and interference, under pretence of such charter or authority ; and there is in like manner, now here drawn in question, the validity of the statute of *Maryland* incorporating the *Baltimore and Ohio Rail Road Company*, and of the pretended authority so set up, asserted, and exercised by the complainants under that statute, in so far as that statute, or that authority has been, is, or may be held or construed, set up, asserted, or exercised to operate any revocation, diminution, alteration or interference of, or with the prior and preferable title, right and privilege so set up and claimed by these respondents as aforesaid, or in any manner to set up and assert any adversary title, right or privilege, or the pretence of such in the complainants ; the said statute and the said authority, so set up, asserted and exercised under the same by the complainants aforesaid, being so far, and to every such intent and purpose as aforesaid, repugnant to the constitution of the *United States* ; of all which matters these respondents crave all the benefit and advantages in this answer, that they might or could have had from any form of averment, or from any form or mode of equity pleading whatever.

The general replication was filed to the answer.

BLAND, chancellor, afterwards, on the 21st of July, 1829, with the consent of parties, ordered, that the three bills be consolidated, and that the answer filed on the 16th of May last, be received as an answer to said three bills so consolidated, subject to all just exceptions.

And on the 24th of September, 1829, on the motion to dissolve the injunction, he passed the following order.

The motion for the dissolution of the injunction heretofore granted in this case, standing ready for hearing, the matter was opened, and the argument commenced by the solicitors of the parties, on the 21st of July last, and continued until the 6th of August following; when permission was given to add, by way of notes, some remarks upon such new matters as had not been presented in the opening, on the part of the plaintiffs. Whereupon a kind of supplemental argument in writing, was prepared on each side, which, with the pleadings and their exhibits, amounting, on the part of the defendants, to a very large mass, were submitted on the 19th of August last; since that time, I have read the proceedings, and maturely considered the whole case.

It appears that the plaintiffs, by their act of incorporation, were authorised, for the purpose of making the contemplated road, to enter upon, use and excavate, any land which might be wanted for the site of their road, or its necessary works; and to enable them to acquire a complete legal title to such land, upon making compensation for it, they were authorised to agree with the owner for the purchase of it; or if he were unwilling or incompetent to sell, or out of the county in which the property wanted, might lie, they were authorised to obtain a warrant for having it valued and condemned to them in the mode prescribed; under these powers, they proceeded to enter upon the lands along the route they have described, as the site of their road thus located; and to procure a complete legal title to those lands, they agreed with the owners of some parts, for a legal conveyance, and had sued out warrants for the purpose of obtaining a legal

title to other parts thereof, in that way. That neither the *Potomac Company*, (a body politic in existence at the time the plaintiffs filed their bill, and who were made defendants to it, but who have since been dissolved,) nor the present defendants, had ever, in any manner, acquired any title to the lands over which the plaintiffs had located their road; and that these defendants had, notwithstanding, attempted, and were about to obtain a legal title, in the modes authorised by their act of incorporation, for the identical same lands so entered upon, agreed for, or about to be condemned by the plaintiffs. By which means they would be enabled to interfere, very injuriously, with the rights of the plaintiffs, and involve them in great difficulties. To prevent which, the plaintiffs prayed an injunction, which was accordingly granted.

The equity arising out of these facts, may be expressed to this effect: Where two or more are allowed, by law, to purchase and acquire a title to lands, upon certain conditions, and according to a prescribed mode of proceeding, he who does the *first* requisite act for that purpose, shall not be hindered in his further progress; because the law has thus held out a pledge, that no one else shall be permitted after that, so to interpose any obstacles, or to arm himself with a formal legal title, by means of which he may be, at least, enabled to litigate and embarrass, if not to overthrow, the right of him whose title had been thus, *first* begun. To refuse an injunction, in such a case, against an impertinent and wrongful intruder upon an inchoate title, which at common law is altogether defenceless, would be to stand by, and openly tolerate a race for the means and weapons of litigation and strife.

But the principles upon which this injunction rests, must be familiar to every one, at all acquainted with the origin of land titles in *Maryland*. A title to land may be obtained from the *State* through the land office, among other modes, either under a common, or a special warrant; but when the legal title has been perfected under either, it relates back

to the date of the special warrant, or the date of the certificate of survey, by which the particular parcel of land was designated, as that *first* act distinctly manifesting an intention to purchase that land so specified. After the taking of which *first* step toward a purchase, equity forbids any one else from interfering; and, if another person does attempt to intrude, he may be restrained in a summary way, by a *caveat* in the land office. The object of the *caveat*, as of the injunction, in this instance, is to prohibit the defendant from obtaining that to which he can have no just claim, and to prevent him from providing himself with the means of mischievous controversy. Upon these principles, I granted the injunction in this case; and I still feel satisfied that it was correctly granted.

The defendants, by their answer, have not denied, nor even questioned any of those facts upon which the plaintiffs' injunction reposes; those facts are all of them admitted, or not being denied, are now to be taken as true. But the defendants, taking an extensive range, have gathered together and condensed in their answer, a great mass of facts and circumstances, shewing, as they say, the notoriety of the public and early dedication of the ground in question, to the purposes of a canal; and they allege that there are numerous passes between the tide and *Cumberland*, where the *Potomac* breaks through the numerous ridges, mountains, and rocky precipices, where it is hemmed in by rocky and high banks, with a very narrow space between; which narrow passes being wholly taken up by the rail road, leaves no room for the canal to be constructed on the same side of the river, but at enormous expense, and which, in fact, produces such difficulties as to endanger their whole project. These allegations, and their whole case, as they state, are deducible from a multitude of acts, proceedings, and papers, which they have exhibited as a part of their answer; and all of which they aver to be public and authentic documents. In this manner they introduce a case, which, as they allege, is so sustained, that the court must

take judicial notice of the facts of which it is composed; and those facts being so noticed, they give rise to a counter-vailing equity, which avoids, displaces, and altogether overrules every equity upon which the plaintiffs can rely; and therefore they argue, that the court may with as much propriety, be called on now to dissolve the injunction in their case, so made out, as if they had shown a public act of the general assembly, the operation of which, displaced the equity, or was incompatible with the further continuance of this injunction.

There are some distinctions and principles which it will be useful to recall to our recollection, and constantly to bear in mind, in order to a more perfect understanding of this case. When speaking of a court of common law, or of its proceedings and powers, a distinction is always made between *fact* and *law*; and much is said in the books which treat of their proceedings, of this distinction; and it is shown, that in some instances, *fact* and *law* are inseparably blended. The difficulties with which those courts have to contend, as to where, and how, the line should be drawn between *fact* and *law*, arises, for the most part, from the peculiarity of their constitution. They are always constituted of two distinct branches, the judge, and the jury; to the judge alone belongs the right to decide on the *law*; and the jury is only charged with the duty of finding the *fact*. All legal rules involve both law and fact; because the rule itself is either declared to be only applicable to a certain state of facts, or it is one which is assumed as always arising out of some particular fact. Every *law* is then nothing more than the *incident*, or *consequence*, annexed to a particular combination of facts, *ex facto oritur jus*—1 *Stark. Ev.* 406. 3 *Atk.* 36. In speaking of the proceedings in a Court of Chancery, the same distinction is made, and exists precisely in the same way, and to the same extent in all respects. The phrase is changed, and nothing more; we do not here speak of the distinction between *fact* and *law*; but of that between *fact* and *equity*; excepting only so far as a refer-

ence is made to the different constitution of the tribunals, the sense and meaning of the two expressions are exactly the same, to all intents and purposes. And if the chancellor were to have associated with him, a jury for the purpose of finding the *facts*, leaving him only to decide upon the *equity*, the same kind of difficulties would arise, and as often, in this court, as to the proper distinction between *fact* and *equity*, as between *fact* and *law*, in a court of common law.

In the case of *Salmon vs. Clagget*, I endeavored to explain the principles by which this court had been, and would continue to be governed in relation to motions for dissolving injunctions. I stated that there was, or in many cases might be, a very clear distinction drawn between the *facts* composing the case on which the injunction rested, and those making up the whole case of the bill on which the relief was prayed; and the case presented by the answer, including as well the facts set forth in avoidance of, as those which are responsive to the bill. In a word, that as the equity arising out of each combination of facts, as its incident, must vary as the combination of facts essentially varied, it became necessary to determine what was that combination of facts to which the court must confine itself, on a motion to dissolve the injunction; and I then declared, that it must confine itself exclusively to the case, or combination of facts set forth in the bill, out of which the equity of the injunction arose, and to the answer of the defendants to those facts. Through the whole of the explanation of this subject in that case, I took it for granted, that the distinction between *fact* and *equity* was perfectly understood, and constantly attended to; because it was a common, substantial, and elementary one. I was the more particular in the explanation of the peculiar, and often circumscribed nature of the case on which the injunction rested, because, as I there showed, the loose and general expressions of the *English* books upon this subject, however well adapted to the course of proceeding in that country, by no means con-

veyed a correct notion of the principles by which this court was governed; and because I perceived that although the *New York* adjudications, which are highly respected here, had in some cases, laid down the rule as it prevails here, and had declared it to be according to the reason of the thing; 1 *Hopk.* 276, 4 *John. C. Rep.* 499; yet they had in other cases, apparently deviated from it; 7 *John. C. Rep.* 323; and also because, the no less highly respectable decisions of *Virginia*, had sanctioned a course of proceedings in that State, which was wholly unlike ours, and as it seemed to me, unsuitable to the constitution of this court. 1 *Hen. and Mun.* 8.

In this case much has been said about the injunction granted by the County Court of *Washington*. That case, as I have repeatedly declared, has no sort of necessary connexion with this. The wrong complained of here, is the fact of the defendants endeavoring to purchase certain land which the plaintiffs were about to purchase, and to which they had previously begun to acquire a legal title. Now, I have not perceived from the pleadings in the case, or been able to gather from the arguments, that this matter of controversy is in any way involved in that suit, or that any judgment I can pronounce in this case, can in any manner bring this court in collision with the *Washington* County Court. There was, in truth, no necessity to have made the slightest allusion to the suit in that county court; but since that suit has been fully and specially referred to in this bill, I will here take occasion to remark, that this case has been thus made, to afford an example of the distinction, I endeavored to illustrate in the case of *Salmon vs. Clagget*, between the case on which the injunction rests, and the whole case of the bill upon which it prays relief. Here the plaintiffs state themselves to be purchasers, who had taken the first requisite step towards completing their purchase, and were going on to do so, when these defendants stepped in, and were attempting to take the bargain from them, or to put themselves in a condition to contest their

complete title when it should be obtained. So far the facts were necessary to this injunction. The plaintiffs then introduce all the circumstances of the county court injunction and suit. Now, those facts could be of no service to them, as a basis for the injunction asked for here; but at the final hearing they might have been of use, as a reply to a charge of laches in not going on, with due diligence, to perfect the legal title they had begun, had it been alleged in the answer that they were unworthy of relief, because of any such negligence, since that county court injunction would have sufficiently accounted for the delay, and prevented its being thence inferred, that the plaintiffs had tacitly abandoned their incipient title. For that purpose, and as showing why the plaintiffs should be restored to those advantages, which they ought to have been allowed to derive from their first step toward a complete title, when that injunction, if at all, shall have been withdrawn, so as to allow them to proceed, are the only modes in which any thing that is said about the county court suit can have any bearing upon this case; and in this way, it furnishes an example in this suit, of the difference between the case of the injunction and that case, every part of which might have been necessary to give a sufficient foundation for the relief prayed.

In the consideration of a motion to dissolve an injunction, on the coming in of the answer, it is essentially necessary that these distinctions should be constantly borne in mind; and that we should be every way careful, not to confound the equity and merits of the case with that combination of facts of which the case is composed, and which gives rise to the equity upon which the injunction reposes. These distinctions are our chief or only guides through the mazes of the numerous and various allegations, averments, and arguments, which each one of the parties may introduce into the pleadings by which he exhibits his case to the court. In a court of common law, as regards the rights of the judge and jury, there may often be much difficulty in distinguishing between *fact* and *law*; but here, and in cases of this

kind, the distinction between *fact* and *equity* being deduced from the pleading, is much more easily drawn. The allegations of the pleadings, so far as regards *facts*, are offered as by a witness giving testimony. The averments of fact in an injunction bill are sworn to, as by a witness, to cause the court to believe in their truth; and so believing in them, to perceive the incident equity arising therefrom, which will authorise the granting of an injunction. And a defendant is bound, and may be forced to make answer, on oath, to all the facts so stated in the bill; he responds, in many respects, as a witness; and his answer is evidence of *facts*, not of equity; consequently, if the pleadings in chancery are taken, as they certainly may be to this purpose, as the declarations of witnesses testifying to facts, the distinction between what must be regarded as *facts*, and what as *equity*, in a bill or answer, will be seen in a clear and striking point of view. A party speaking only as a witness, cannot be said to alter, or cause belief in any principles of equity, by making oath to their existence, since they are annexed to, and made incidents beyond his control, of certain combinations of *facts*; and the court is bound, in the most emphatic sense, to take notice of all such principles without proof. Therefore, on a motion to dissolve an injunction, the best test of what are properly averments of fact, in a bill or answer, is, whether they are such matters as a witness might be called on to prove, or the truth of which must be established by evidence, to enable the court to act; if they are not, then they are either sheer principles of equity, or some of those public and established facts, such as the constitutionally appointed day of the meeting of the general assembly, or the like, of which the court is bound to take judicial notice without any proof whatever.

The defendants, in support of the position, that their case is substantially made up, only of such matters of which the court is bound to take notice, relied upon 1 *Stark. Ev.* 166. But the subject there treated of, can have no manner of relation to this case, as it now stands upon this motion. Here

the position taken is, that no proof of any kind can be required; there, the inquiry is, concerning the public written instruments of evidence; the forms with which they must be clothed to entitle them to be received as such, and of the nature of the matter, of which, they may be deemed sufficient proof. No one will question the soundness of the general principle there laid down. It amounts to no more than this, that the acts of the whole government, or any one of its departments, may be shown by giving in evidence those papers and documents which are the usual and established forms by which it exercises or manifests the powers belonging to it. In *England*, the king alone declares war; and therefore, a royal proclamation to that effect, is there held to be sufficient evidence of a state of war; in this country, *Congress* alone can declare war, and hence, here no instrument short of an act of *Congress*, can be deemed sufficient evidence of the *United States* having placed themselves in a state of war. This principle of evidence may, perhaps, be considered as alike applicable to all countries. But the showing that certain papers and proceedings may be used as evidence, for any purpose, by no means sustains the position, that the court is bound to take notice of them as public and authentic documents. 2 *Camp.* 44.

The general principle, as illustrated by the authority relied on, applies only to the inquiry, what is proper and sufficient evidence of certain facts? The question here is, not as to the nature or the instruments of evidence, but whether the case, or the facts are such, of which no proof whatever is required; because of their belonging to that class of matters of which the court is bound to take notice. The position taken by the defendants, repudiates all proof; they aver, that their case is made up of that, which gives them a full dispensation from the necessity to produce proof of any description; and therefore, they invite the court so to look upon it, to sanction the truth of every part of it, and to act accordingly.

I take it to be clear, that as to all those facts and circumstances of which the court is bound to take notice, on a motion to dissolve an injunction, the parties stand before it in the same situation, as that in which, a dissolution is asked for, on the ground that the facts set forth by the bill, give rise to no equity upon which an injunction ought to be granted. It is a well established principle in equity, as well as at law, that a plaintiff can only obtain relief upon the strength of his own claim, and not upon the weakness of that of his adversary ; and therefore, if it should appear that the facts as stated in the bill, looking to it alone, gave rise to no equity, it is very certain, that the injunction would be dissolved, whether the defendants had answered or not, or however imperfectly they might have answered. Let it then be supposed, that an injunction had been granted to restrain the making of a canal, or the doing of any other act, under an impression, that the defendant had been clothed with no authority to do the act complained of, and it should be afterwards shown to the chancellor, that a public act of the general assembly, of which he was bound to take notice, had fully authorised that very act, it is certain, that he would, in such case, immediately dissolve the injunction, even without an answer, or without regard to the imperfections of the answer ; consequently, if the exhibits of these defendants be in truth, as they have alleged, such public and authentic documents as the court is bound to notice, they might, by merely reading them to, or reminding the court of them, have obtained all the benefit from them which they could have had in any other way. If taken altogether or separately, they give rise to such an equity as is incompatible with that on which the injunction rests, it must be dissolved. This might have been done by the defendants, without making any answer ; but a defendant may, in general, insist on any matter, by way of answer, which he may take advantage of, by plea or demurrer ; here the answer relies expressly upon that countervailing equity arising out of the combination of facts which it has set forth, in avoid-

ance of the plaintiff's case; and therefore, if those facts are such as the court is bound to notice, their being couched in the form of an answer, cannot release the court from that obligation; nor can they be thus rendered, in any manner, less acceptable to the court, or less available to the plaintiffs, than if they had been shown in any other way.

It is laid down as clear law, that no evidence can be required to prove the existence of a fact, which must have happened according to the constant and invariable course of nature, or to prove any general law, or other public matter, of which the courts are bound to take judicial notice. An act of assembly relating to a public highway, is a public act of which they will take notice; but of private acts they take no notice. 1 *Stark. Ev.* 163, 400. They take notice of the order and course of proceedings in each of the two houses of the general assembly. 1 *Saund.* 131; but not of their journals, or votes and proceedings; 1. *Ld. Raym.* 15; nor are those journals, when proved, evidence of any facts stated in the resolutions or reports of committees, which are not a part of the proceedings of the house: 1 *Stark. Ev.* 167. The courts of justice of the several States must take notice of all public acts of *Congress*, even including, (as may be admitted in this case,) those which relate exclusively to the municipal affairs of the *District of Columbia*; but they are not bound to notice any foreign law, or law of any other State of the Union. The acts of the other States of the Union to be admitted even as evidence, must be authenticated according to the act of *Congress*. The courts of justice are also bound to take notice of the civil geography of the State, as of the counties, districts, and cities, established by the State government; and also of the districts and ports which are the divisions made of it by the federal government; but they do not notice the local situation of plains within particular counties, or the distance of counties from each other. 4 *Bar. & Ald.* 243. And although they will notice the extent of ports, 1 *Str.* 469; yet the straightening of a port, by building too far into the water, where

ships or vessels might have formerly ridden, is a matter of which they cannot take notice, but it is a question of *fact* to be determined by a jury upon evidence. *Harg. Tr.* 85. As regards the subject now under consideration, the obligation of the courts of justice to take notice of various matters and things, extends thus far, and no further. It only remains to inquire, therefore, whether those matters which the defendants have condensed into the form of an answer, and proffered to the consideration of the court, are some of those of which it is bound to take judicial notice.

The line of road to be formed by the plaintiffs, and the canal to be constructed by the defendants, are both of them, declared to be public highways; and therefore, the several acts by which they have been incorporated, are public laws of which the court is bound to take notice. The acts of *Congress*, and of the other States of the Union, in relation to these two public highways, may also be noticed, on the ground, that they have been called for, recognized, or adopted by public laws of this State, which have actually taken effect; but no private act of this State, nor any legislative enactment of any other State, which has not been thus expressly invoked, and in a manner, introduced into the body of our public statute law, can be noticed by this court; and therefore, none of the acts of the legislature of *Virginia*, or of any other State, passed prior to, or which have not been adopted by those acts of ours, of 1826, *ch.* 123, and 1824, *ch.* 79, by which the plaintiffs and defendants had been incorporated, can be now noticed. It is also certain, that all the journals, reports of committees, and every thing else, found among the proceedings of any legislative body, must, upon the present occasion, be laid aside as matters which the court cannot now notice. As to the multitude of private papers referred to in the answer, such as proceedings of sundry meetings of respectable people, who gave themselves the name of conventions, private letters and the like, as it has not been very seriously contended, that they should be noticed, and considered, as public and

authentic documents, in any respect so as to affect the rights of property any where, or to any extent, I may, without scruple or hesitation, throw aside the whole mass of papers of that description, at least for the present, as utterly unworthy of being judicially noticed without proof, for any purpose whatever. But the defendants in their answer, say, "that at the *Point of Rocks*, where the *Potomac* intersects the ridge of the *Catoctin* mountain, and where the pretended route of the said rail road is described by the complainants, in their said bills, to strike the *Potomac* river—there is one of those narrow passes in the actual route and site of the canal, as *officially* and definitively selected, surveyed, and laid down as aforesaid, which presents no choice of ground for the canal ; but where for a considerable distance up the river, along the foot of the mountain and its spurs, the canal is confined by the nature of the ground, within certain primeval and immoveable barriers ; *as is more particularly shewn and illustrated by the topographical descriptions, maps and profiles of the engineers, herewith exhibited, and above referred to.* Through the whole of this pass, the space between the jutting and precipitous rocks on the one hand, and the river on the other, is so narrow, that in order to obtain the proper and necessary breadth for the canal and its towing path, a solid and wide wall must be constructed in the river ; and if the canal be intercepted and cut off by the rail road, or otherwise, from that single route through this pass, it must be completely intercepted and cut off from the whole of its route above ; and be either entirely stopped and defeated, or compelled to the precarious, dangerous, and enormously expensive, and every way inconvenient and burthensome expedient, of crossing to the opposite side of the river on an aqueduct ; and then, in order to regain its route to its western *terminus*, of recrossing the river on another such aqueduct, at such unknown and uncertain point above, certainly not lower than *Cumberland*, as where it may please the complainants to allow them verge and space enough." From this the defendants argue,

that by an act of *Congress*, which the courts of justice are all bound to notice, the president was authorised to order surveys to be made of the most suitable routes for roads and canals; that therefore, this court must take notice that the president did execute that law by ordering surveys to be made; that one of those surveys was made expressly for this canal, as a location of its route, and as a first step towards an absolute appropriation of the land along that route, to its use; that the maps and profiles now shown are those made to exhibit the result of that survey; and that those maps and profiles clearly show, that the canal has been either altogether intercepted and cut off, or most illegally and ruinously turned aside, from its rightful and destined route by the rail road. This is drawing consequence from consequence, and piling notice upon notice, to a great extent and height indeed. The act of *Congress*, as a public law, it is true, must be noticed; and because the law presumes, that every officer has properly performed his duty, until the contrary appears, it must be admitted that the president did order *some* surveys to be made, as required by that public law. But there is no adjudged case, or principle of law, which declares it to be the duty of the courts, to take judicial notice of the execution of any public statute whatever. If they were bound to take notice of the manner in which this public act of *Congress* had been executed, then, upon the same principle, they would be bound to notice the manner in which every public statute was executed. There are many public statutes requiring acts to be performed by justices of the peace and constables; but to take judicial notice of the manner in which such officers had executed a public statute, and so to admit their *ex parte* proceedings to affect the rights of property, would be absurd and mischievous. The various modes in which the public statutes are carried into effect by the executive officers of government, are, in principle and in law, all proceedings of the same character; they are mere *facts*, and are not some among those public

proceedings, of which, the courts of justice are bound to take notice; consequently, when, where, and how, those surveys were made, as authorised by the act of *Congress*, and the topographical maps and profiles exhibiting the results of any of them, are all matters of fact to be shown and established by proof; and even when they shall have been so established, it will remain a question how far they can be received, even as evidence, to affect the interests of any one who was not a party to their being made, or who had not, in any way admitted their verity and correctness. Abstracting then, every thing from the case of the defendants, of which the court cannot take notice, and there remains nothing left to them with which they can assail the equity of the plaintiffs, except their several acts of incorporation; but with these alone they have attempted to maintain their ground.

I have read the act incorporating the plaintiffs, and also that incorporating the defendants, and compared them with each other. These two bodies politic are entirely distinct in all respects; there is not one single sentence in the acts, by which either has been incorporated, which has the most remote allusion to the other; nor does the sense of any expression contained in either of their acts of incorporation, in the slightest degree, indicate that there probably may, or possibly can arise, any jarring between their respective franchises, or collision of their several interests, in any way whatever. From all or any thing apparent upon the face of those legislative enactments, there is no room to infer, that each one of these two corporations may not proceed in all their operations, without the least interference with the other. If then, upon the face, and according to every fair reading of these several acts of incorporation, all is harmonious between them, the discord can only have arisen from the manner of executing the one or the other, or both of those laws, and in no other way; and that this controversy between these parties has only originated in that way, appears to be admitted by the defendants themselves. In

their answer they say, that “according to the complainants’ own showing, and the facts are otherwise true and notorious, they have the choice of two or more practicable routes for their rail road, without any interference with the canal, or connexion with, or even approximation to the river ; the different routes only presenting some differences in the comparative labor and expense of construction ; and these compensated, if they occur, with any considerable increase, on the more northern route originally proposed for the rail road, by the advantages and savings, from directness of course, and shortness of distance, as the principal and leading personages, both among the original projectors and promoters, and the present managers and proprietors of the rail road, have repeatedly averred and publicly contended, the principle, and the operation of the lifting power of stationary steam engines, by which the rail road overcomes ascents, and gains new levels, admit of an infinitely greater diversity and extent of application than that of the canal, circumscribed and limited as it is by water levels ; and are perfectly practicable and convenient, and within the ordinary compass of that power, either to overcome all the necessary ascents on the more northern and direct route first proposed for the rail road, or if, what the complainants designate the southern and circuitous route be preferred by them, to assume, with ease and convenience, a higher level than the canal, on that route, and leave the canal ample verge and room between the rail road and the river ; there is no necessary and proper connexion or dependence, between the rail road and the river ; either intrinsically, as regards the construction, appendages and uses of the rail road, or relatively, as regards the purposes of intercourse, trade, and commerce, which the rail road was designed to subserve ; whereas the river is, as it were, the life-blood of the canal ; and continual access and frequent communication, from one to the other, are inseparable, from the very idea of the canal.” Here, it is distinctly alleged by the defendants, that the injury they complain of, has arisen altogether from the location

which the plaintiffs have given to their road, under their act of incorporation ; that is, not from the law itself, but from the execution of the law.

The defendants insist, that by virtue of their grants and franchises, they have a priority of right to the choice and selection of the route and site of their canal, along the margin and bank of the river *Potomac*. They mainly, and in every way, rest upon this priority of right to a choice of routes. If it exists at all, it must be founded upon the various facts and circumstances, as shown by them, when taken in connexion with the acts of the general assembly, by which they have been incorporated ; or it must be based upon those acts of assembly alone. But if, as in the first supposition, its foundation is composed of those facts taken with the law ; then it certainly cannot avail them, upon the present motion, because, as has been shown, those *facts* are none of them, of that character of which the court can now take notice and act upon. Take the other supposition ; and let their alleged right be admitted to have been expressly given by a public law, of which the court must take notice ; even then they cannot avail themselves of it upon the present motion ; because they have been deprived of it, as they themselves state, not by the act itself by which these plaintiffs have been incorporated, but by the manner in which that law has been executed ; which *mode* of executing the law, is clearly a matter of *fact* of which this court cannot now take notice.

I do not understand, that the defendants contend for an arbitrary and whimsical right of choice, which, without regard to their own real interests, may be capriciously turned against the plaintiffs, or any others, merely for the purpose of intercepting their line of operations. They certainly cannot claim such a right, with any design to use it, for the very same evil purposes of which they themselves now complain ; it must be, therefore, that the right of choice for which they contend, is one, which, in its exercise, is to be governed by fairness, justice, and equity. If this be the

kind of right for which they contend, and none other could be sanctioned by a Court of Equity, then it is evident, that the court has not, as yet been furnished with the means of forming any fair and correct judgment upon the subject. It has heard, so far, only the allegations of one side, and that that too, without any proof in support of those allegations which it can allow itself to notice, and act upon. The bill and all the allegations of the plaintiffs are perfectly silent in respect to this right of choice, as now claimed by the defendants. The claim, and every fact relating to it, make their appearance, for the first time, in the answer of the defendants. The plaintiffs could not be, nor were they expected to come prepared for a vindication of their rights, so far as they are implicated by this claim;—their case, as shown by their bill, either as necessary to an injunction or to relief, called for no such disclosures as the defendants have set forth respecting this claim of a right of choice; and consequently, every thing relating to it, is entirely new matter, advanced in avoidance of the plaintiffs case, and concerning which they have yet had no opportunity to show any thing, on their part. Justice and equity, therefore, do most manifestly require, that the injunction heretofore granted, upon an equity which the defendants have been unable, otherwise, to controvert, should be continued until the validity and extent of the claim of the defendants can be examined, and ascertained upon surveys and evidence, which each party may be allowed to make and produce; and from which the court may be furnished with the means of determining, whether or not, these two apparently harmonious acts of incorporation, have, in reality, by the improper execution of one of them, been brought into ruinous conflict with each other.

If, upon an order of survey, authorising these parties to lay down their respective pretensions, in the usual manner, and on the return of such topographical maps and profiles as may be specially directed, if required, the fact appears, that the location of the rail road does deprive the canal of

its most suitable and advantageous route, then the question will fairly arise, and be correctly presented to the court; whether the defendants have a priority of right, to the choice and selection of the route of their canal, or not. The extent of the interference and the nature of the collision between these two bodies politic, will then, and in that way, be clearly and properly presented, according to the showing and proofs of both parties.

Commissions to take evidence were issued, the last of which was returned on the 27th May, 1831. It is not deemed necessary to recite any part of the proof, as those portions, that bear on the question decided by this court, are adverted to, by the judge who delivered the opinion of the majority of this court.

BLAND, Chancellor, (September term, 1831.)

This case standing ready for hearing, and the solicitors of the parties having been attentively heard, the proceedings were read, and maturely considered. Whereupon it is adjudged, ordered, and decreed, that the injunction heretofore granted in this case, be, and the same is hereby confirmed, and made perpetual. And it is further adjudged, ordered, and decreed, that the defendants, *The Chesapeake and Ohio Canal Company*, pay unto the said plaintiffs, *The Baltimore and Ohio Rail Road Company*, all their costs expended by them in this suit, including all the expenses of the survey, to be taxed by the register.

From this decree the defendants appealed to the Court of Appeals.

The cause came on to be argued before BUCHANAN, Ch. J., EARLE, STEPHEN, ARCHER, and DORSEY, J.

Walter Jones, and *A. C. Magruder*, for the appellants.

Daniel Webster, and *Reverdy Johnson*, for the appellees.

Canal Company vs. Rail Road Company.—1832.

BUCHANAN, Ch. J., delivered the opinion of the court.

The charter of the *Potomac Company*, was created by the mutual and concurrent legislative acts of *Maryland* and *Virginia*, in the year 1784, to which there are many supplements.

The act for incorporating the *Chesapeake and Ohio Canal Company*, was passed by the legislature of *Virginia* on the 27th of January, 1824. The 1st section of which has this provision, "that so soon as the legislatures of *Maryland* and *Pennsylvania*, and the Congress of the *United States*, shall assent to the provisions of this act, and the *Potomac Company* shall have signified their assent to the same, by their corporate act, a copy whereof shall be delivered to the executives of the several *States* aforesaid, and to the *Secretary of the Treasury* of the *United States*, there shall be appointed by the said executives, and *President* of the *United States*, three commissioners on the part of each *State*, and the government of the *United States*," for the purpose among other things, of causing books to be opened under the management of "persons to be by them appointed for receiving subscriptions to the capital stock of the company," &c. And by the 22d section it is enacted, "that this act or so much thereof as respects the canal and works designed to be constructed in the *District of Columbia*, and the states of *Virginia* and *Maryland*, shall take effect, with such necessary modification in the construction thereof, as shall fit it for such limited application or use, upon the assent of the Congress of the *United States*, and the legislature of *Maryland* being given thereto; and upon its receiving the further assent of the legislature of *Pennsylvania*, the whole and every section, and part thereof, shall be valid and in full force and operation."

In an act of the legislature of the state of *Maryland*, passed on the 31st day of January, 1825, at the December session, 1824, entitled, "an act to confirm an act of the general assembly of the state of *Virginia*," entitled, "an act incorporating the *Chesapeake and Ohio Canal Company*," after

reciting that act, the assent of the legislature is given to it in these words, "that the said act of the general assembly of *Virginia* be, and the same is hereby accepted, assented to, and confirmed."

In an act of the *Congress* of the *United States*, passed on the 3d of March, 1825, entitled, "an act confirming an act of the legislature of *Virginia*," entitled, "an act incorporating the *Chesapeake and Ohio Canal Company*," and an act of the State of *Maryland* confirming the same, the assent of *Congress* is given in these words, "that the act of the legislature of the State of *Virginia*, entitled, 'an act incorporating the *Chesapeake and Ohio Canal Company*,' be, and the same is hereby ratified and confirmed, so far as may be necessary for the purpose of enabling any company, that may hereafter be formed by the authority of the said act of incorporation, to carry into effect the provisions thereof, in the *District of Columbia*, within the exclusive jurisdiction of the *United States*, and no further." And on 16th of May, 1825, the full and unqualified assent of the *Potomac Company* was declared and signified by a corporate act, in the manner required; with authority to the president and directors of that company, to surrender its charter, and convey all the property, rights and privileges, owned, possessed, and enjoyed under it, to the *Chesapeake and Ohio Canal Company*, agreeably to the provisions of the 13th section of the act incorporating the latter company; which surrender and transfer, the same section empowers the *Chesapeake and Ohio Canal Company* to accept. So that on the 16th of May, 1825, the act incorporating the *Chesapeake and Ohio Canal Company*, or so much thereof, as respects the canal and works designed to be constructed in the *District of Columbia*, and the States of *Virginia* and *Maryland*, in the language of the 22d section of that act "*took effect*," the assent of the *Congress* of the *United States*, and of the legislature of *Maryland* having been before given to it; and the assent of the legislature of *Pennsylvania* being by the same section dispensed with, so far as respects those portions

of the contemplated canal, and only required in relation to the part proposed to be made in that State. Still the assent of the legislature of *Pennsylvania*, on certain conditions not material in the examination of this case, which relate only to a portion of the canal designed to be constructed in this State, was given by an act of the 7th of February, 1826—and commissioners were appointed as authorised by the charter, by the President of the *United States*, and the executives of *Virginia* and *Maryland*, for receiving subscriptions to the capital stock of the company, &c.

On the 3d of December, 1823, the President of the *United States*, adverting in his message to *Congress*, to the proceedings of a convention, called the *Chesapeake and Ohio Canal Convention*, (which had sat at the city of *Washington* in the preceding month of November,) in relation to the scheme of the *Chesapeake and Ohio Canal*, recommended the authorising by an adequate appropriation, the employment of a suitable number of the officers of the corps of engineers, to examine the ground, and report their opinion thereon. On the 30th of April, 1824, an act of *Congress* was passed in pursuance thereof, appropriating \$30,000 for the purpose of procuring the necessary surveys, plans and estimates, upon the subject of roads and canals. In the month of May, 1824, the President appointed a board of internal improvement, who were, on the 31st of the same month, instructed to “proceed to make an immediate reconnoissance of the country between the tide waters of the river *Potomac*, and the head of steam boat navigation of the *Ohio*, &c.” “for the purpose of ascertaining the practicability of a communication between those points, of designating the most suitable route for the same, and of forming plans and estimates in detail, of the expense of execution, and to use every possible exertion to have their report prepared in time, to be submitted to *Congress* at their next session. On the 2d of February, 1825, the board of engineers for internal improvement, made a report of their proceedings,

accompanied by surveys, maps and profiles, but without any estimate of the probable cost of the projected work, which was communicated to *Congress* by the President, on the 14th of the same month. At this time, neither the assent of *Congress*, nor of the *Potomac Company*, had been given to the act of incorporation. That report which was immediately printed and published, by order of *Congress*, asserts the entire practicability of a communication between the tide waters of the river *Potomac*, and the head of steam boat navigation of the *Ohio*, by a continuous canal, which, in the report, surveys and maps, is called the *Chesapeake and Ohio Canal*; and that portion of it extending from the tide waters of the *Potomac*, to the mouth of *Savage* river, on the north branch of the *Potomac*, is designated as the eastern section, which, in the report is described in these words; "this section ascends the valley of the *Potomac*, as the several ridges which that river traverses and breaks through, oblige to follow its course without any deviation, the side on which it should ascend *along* the river, is the only choice left to the engineer."

The route of that section throughout its whole course, as surveyed and laid down by the board of engineers for internal improvement, is in the valley of the *Potomac*, along the shores of the river; particular places being marked, as suitable points for crossing the river from shore to shore, should it be found necessary, but a preference being given to the north or left side. Thus, they say in one part of the report, "this short analysis is sufficient to show, that the *northern* side of the valley offers the best ground for receiving the bed of the canal." And after describing the valley, they say, "such are the local features of the valley through which this section of the canal, *east* of the *Alleghany* must be directed."

On the 6th March, 1826, the legislature of *Maryland* passed a law for the promotion of internal improvement, incorporating a company to be called, "*The Maryland Canal Company*," to make a canal "from *some convenient point*

on the *Potomac River*, intersecting or continuing *The Chesapeake and Ohio Canal* to the city of *Baltimore*;" authorising a subscription by the treasurer, for the stock of the *Chesapeake and Ohio Canal Company*, to the whole amount of the stock of the *Potomac Company* owned by the State, and of the debt due to the State by that company; and also authorising the treasurer to subscribe for 5000 shares of the stock of the *Chesapeake and Ohio Canal Company*, on condition among other things, that the *Congress* of the *United States* should by law, authorise a subscription for not less than ten thousand shares of the capital stock of the *eastern section* of that canal, with a proviso, that the executive of the State, "shall previously be satisfied, that the residue of the sum of money estimated by the *United States'* board of engineers, to be adequate to the completion of the *eastern section* of the *Chesapeake and Ohio Canal*, after deducting the amount of the subscriptions of the State of *Maryland* and of the *United States*, therein provided to be made, hath been actually subscribed by *bona fide* and competent subscribers." Thus recognizing the board of engineers for internal improvement, and sanctioning the survey and location, they had made of the route of the *eastern section* of the *Chesapeake and Ohio Canal*, through the valley and along the shore of the river *Potomac*, which was the basis of the estimate to be made by them of the amount necessary to the completion of the canal. On the 8th March, 1826, permission was given to the State of *Pennsylvania*, by an act of the legislature of *Maryland*, to make any canal or rail way, "to connect with the *Chesapeake and Ohio Canal*."

On the 23d October, 1826, the board of engineers for internal improvement made a report exhibiting a plan, and estimate of the cost of constructing the canal; which report was communicated to *Congress* on the 7th December, 1826, and printed and published by order of *Congress*. The estimated cost of the *eastern section* from *Cumberland* to *Georgetown*, 186 miles, is \$8,177,081 05, which estimate is

made upon the basis of the survey, before made and reported by them on the 2d February, 1825, confining the route of that section to the valley of the *Potomac*; and upon the construction of the canal, upon, and along the *Maryland* shore throughout. The engineers in their report, say, "after due investigations upon this subject, we remain convinced, that it is more expedient, less expensive, and liable to less accidents, to keep without deviation, on the same side of the valley; and the *Maryland* side has received the preference, for the following reasons, &c." Their estimate of the cost of the whole canal to the *Ohio* is \$22,375,427 69.

These estimates not being satisfactory, and differing essentially from estimates made by the *Chesapeake and Ohio Canal Convention*, and no aid being given by Congress during that session, to the *Chesapeake and Ohio Canal Company*; on the 3d March, 1827, a number of the members of Congress, requested of the President, that they might be submitted during the recess, to the revision of practical civil engineers, and *James Geddes* and *Nathan S. Roberts* were appointed to re-examine the route of the canal, as it had been surveyed and laid down by the board of engineers for internal improvement, and to report on the expense of constructing it.

On the 5th February, 1827, at the December session, 1826, the legislature of *Maryland* passed a law to amend the "act incorporating the *Chesapeake and Ohio Canal Company*;" the first section of which in terms requires, "that it shall receive the assent of the necessary parties thereto," and the last section provides, "that it shall commence and be in force, as soon as it shall have received the assent of the legislature of *Virginia*, of the Congress of the *United States*, and of the *Potomac Company*." This act authorises the termination of "the *eastern* section of the canal, at or near the town of *Cumberland*, on the river *Potomac*," and the substitution of inclined planes and rail ways in crossing the ridge, which separates the *eastern* from the *western* waters; and provides "that the company

shall have the power to extend a branch of the canal to the coal banks, at or above the mouth of *Savage*," in the event, that, the *western* section *shall leave the valley of the Potomac river*, at any point below the coal banks." This act received the assent of the legislature of *Virginia* on the 26th February, 1827, of the *Congress* of the *United States* on the 23d May, 1828, and of the *Potomac Company* on the 10th July, 1828.

At the December session, 1826, on the 10th March, 1827 the legislature of *Maryland* passed a supplement to the act for the promotion of internal improvement, repealing certain provisos in the act to which it is a supplement, upon which, a subscription for five thousand shares of the stock of the *Chesapeake and Ohio Canal Company* was made to depend; and also repealing, so much of the act to incorporate the *Susquehanna and Patapsco Canal Company*, as should be found to be inconsistent with the provisions of the act, to incorporate the *Pennsylvania and Maryland Canal Company*.

On the 20th August, 1827, due notice was given by the commissioners, that books would be opened on the 1st October following, for receiving subscriptions to the stock of the company; the books were opened accordingly, and on the 14th November, 1827, the amount of stock subscribed for unconditionally, exceeded \$1,500,000, exclusive of subscriptions payable in the stock and debts of the *Potomac Company*.

At the December session, 1827, on the 2d January, 1828, the legislature of *Maryland* passed an act further to amend the act incorporating the *Chesapeake and Ohio Canal Company*; by which the stock is declared to be personal property, and aliens are authorised to subscribe for, and hold it; to commence and be in force, as soon as it should receive the assent of *Congress*, the legislature of *Virginia*, the *Potomac Company*, and the stockholders of the *Chesapeake and Ohio Canal Company*. To which, the legislature of *Virginia* assented on the 26th February, 1828, the *Congress* of

the *United States* on the 23d May, 1828, *The Chesapeake and Ohio Canal Company* on the 3d July, 1828, and the *Potomac Company* on the 10th July, 1828.

At the same session, on the 3d March, 1828, the legislature of *Maryland* passed a further supplement to the act for the promotion of internal improvement, reciting one of the conditions,"upon which the treasurer of the State, had, by a former act been authorised to subscribe for five thousand shares of the stock of the *Chesapeake and Ohio Canal Company*; and the importance it was of, to the State, that the grant already made by her to that company, should be made dependent upon such other conditions and restrictions, as would effectually secure the completion of the *work*, if ever commenced, &c. ; and authorising the treasurer to subscribe for the said five thousand shares, on the condition of stock to the amount of \$2,500,000 being subscribed for, by *bona fide* purchasers, with sufficient security to ensure a faithful compliance on the part of such subscribers ; with other conditions requiring the agreement thereto of the president and directors of the company, and repealing any act or acts, repugnant to, or inconsistent therewith, the conditions of which act, were assented to by the company on the 23d June, 1828.

On the 5th March, 1828, the commissioners for receiving subscriptions to the stock, called a meeting of the stockholders on the 7th April following, for the purpose of electing a president and directors.

On the 10th March, 1828, the *Secretary of War*, transmitted to *Congress*, in obedience to a resolution of the house of representatives of the 26th of the preceding month, the report of *James Geddes* and *Nathan S. Roberts*, (the civil engineers appointed for that purpose,) of the survey and location made by them of the route of the *eastern* section of the *Chesapeake and Ohio Canal*, from a little below *Cumberland*, through the valley of the *Potomac* to the tide water at *Georgetown*, and along the *Maryland* shore of the

river; accompanied by estimates of the cost of construction, amounting for a sixty feet canal, to \$4,479,346 93.

On the 4th of April, 1828, the meeting of the stockholders which had been called on the 5th of March preceding, was deferred, for the reasons assigned by the commissioners in their publication of the postponement, that the government of the *United States*, and the State of *Maryland*, might participate in the organization of the company, when *Congress* should have definitively acted on the memorials of the district corporations, and of the central committee of the *Chesapeake* and *Ohio* convention, and the commissioners; which were for a subscription to the stock of the company, and for which a bill was then depending in *Congress*.

The act of *Congress* of the 23d of May, 1828, among other things recognizes the assent given by the *United States*, to the charter of the *Chesapeake and Ohio Canal Company*, by the act of 3d of March, 1825. By an act of *Congress* of the 24th of May, 1828, the *Secretary of the Treasury* is authorised to subscribe for ten thousand shares of the stock of the *Chesapeake and Ohio Canal Company*, the report, survey and estimate, of *Geddes* and *Roberts*, having then been received and acted upon. And by another act of the same day, authority was given to the corporations of *Washington*, *Georgetown*, and *Alexandria*, to subscribe for stock, and the subscriptions before made by them, were declared to be valid and binding.

On the 26th of May, 1828, *Congress* having then authorised a subscription for ten thousand shares of stock, and declared the subscriptions before made by the district corporations, to be valid and binding, a meeting of the stockholders on the 20th of June, 1828, was regularly called by the commissioners, where president and directors were elected, and the company duly organized.

On the 26th of June, 1828, the route and site surveyed by the *United States'* board of engineers, for internal improvement, and by *Messrs. Geddes* and *Roberts*, and com-

municated to *Congress*, were adopted (so far as they corresponded,) by the president and directors, as the line of the *Chesapeake and Ohio Canal* below *Cumberland*.

On the 10th of July, 1828, the *Potomac Company* assented to all the acts of *Congress*, and of the legislatures of *Virginia* and *Maryland*, affecting the charter of the *Chesapeake and Ohio Canal Company*, so far as such assent might be deemed necessary to their validity.

On the 4th of August, 1828, the *Potomac Company* instructed the president and directors, forthwith to surrender their charter, and convey all their rights and interests to the *Chesapeake and Ohio Canal Company*. On the 15th of the same month, the surrender and conveyance were made, and on the 17th of September following, accepted by the *Chesapeake and Ohio Canal Company*.

Whilst these legislative and other proceedings were in progress, meetings were held in *Baltimore*, by a number of citizens of that place, on the 12th and 19th February, 1827, in whose printed proceedings, the advantages likely to accrue to *Baltimore*, from connecting her trade with the western states, by intersecting the contemplated *Chesapeake and Ohio Canal* within the *District of Columbia*, according to the route surveyed and reported by the board of engineers for internal improvement, and by a direct rail road from *Baltimore* to some eligible point on the *Ohio* river, are contrasted, and the saving of distance by such a direct road, stated to be 140 miles; which proceedings formed the basis of an application (or memorial) which was preferred to the legislature, for an act to incorporate the *Baltimore and Ohio Rail Road Company*, by a committee appointed for that purpose. And on the 28th of the same month, February, 1827, the charter was passed. On the 8th of March, 1827, a law was passed by the legislature of *Virginia*, giving permission to the *Rail Road Company*, to extend their road through that State, but prohibiting its striking the *Ohio*, at a point lower than the mouth of the *Little Kenawha*, on the *Ohio*; and on the 2d day of March, 1831, permission was

given them by an act of *Congress*, to extend a lateral road into, and within the *District of Columbia*.

On the 31st of March, 1827, the whole of the rail road stock was subscribed; and on the 23d of April, 1827, the company was organized by the election of its officers.

On the 20th of June, 1827, a reconnoissance of the country between *Baltimore* and the *Ohio* river, was commenced by engineers in the service of the *Rail Road Company*, with a view to the location of the road.

On the 28th of February, 1828, the legislature of *Pennsylvania* passed a law, authorising the *Rail Road Company*, to extend their road through that State, to the *Ohio* river.

On the 3d of March, 1828, the legislature of *Maryland*, in a supplement to the act for the promotion of internal improvement, authorised a subscription for five thousand shares of the stock of the *Rail Road Company*, on condition that the company should agree to locate it, so as that it should go to, or strike the *Potomac* river at some point between the mouth of the *Monocacy* river, and the town of *Cumberland*, and that it should go into *Frederick*, *Washington*, and *Alleghany* counties.

On the 5th of April, 1828, the engineers who had commenced their reconnoissances on the 20th of June, 1827, made a report recommending a route for the road from *Baltimore* by the *Point of Rocks*, and up the valley of the *Potomac*. Being the very route by the *Point of Rocks*, which had before been surveyed with a view to the location of the canal, by the *United States'* board of engineers for internal improvement; and again by *Messrs. Geddes and Roberts*, civil engineers, appointed by the general government for that purpose, whose report and estimates of the 7th of February, 1828, had then been made public.

The board of engineers in the service of the *Rail Road Company*, after examining the ground on horse-back, and without instruments, approved the report of the engineers of the 5th April, 1828, and their decision in favor of a route for the rail road by the *Point of Rocks*, and through

the valley of the *Potomac* to *Williamsport*, in a report of the 5th May, 1828; upon which report, the route by the *Point of Rocks*, and the valley of the *Potomac* was adopted by the company. Up to that time, no survey had been made in the valley of the *Potomac*, above and from the *Point of Rocks*, at the instance, or for the use of the *Rail Road Company*; and a bill was then depending in *Congress* for an appropriation to the *Chesapeake and Ohio Canal*, by a subscription to the stock of the company.

On the 12th of May, 1828, engineers were deputed by the president and directors of the *Rail Road Company*, to pass along the route thus adopted from the *Point of Rocks* to *Cumberland*; and wherever the character of the ground was such, as to leave but little choice as to the location of the road, or to present but one passage, to make an actual location of the same at once over such ground; in order that the actual locations so made, might serve as regulating points, for its subsequent locations over the intermediate sections, and secure the passage of the road. And at the same time, agents were deputed to take all necessary steps to procure title to, or a right of way over, the lands upon which such actual locations should be made. In pursuance of which instructions, the engineers proceeded to make surveys for the site of the road, at the places indicated, and as actual, partial, locations of it, from the *Point of Rocks* along the *Maryland* shore of the *Potomac* to *Cumberland*. And the agents employed for that purpose, entered into contracts with some of the proprietors, for the title to, or right of way over, their lands so surveyed, and commenced process of condemnation of other parcels of land, actually surveyed for the site of the road, with the owners of which, they were unable to make contracts for the title to, or right of way over.

In this state of things, the *Chesapeake and Ohio Canal Company* claiming to be then duly incorporated, and the *Potomac Company* (not having at that time surrendered its charter and transferred its interest to the *Canal Compa-*

ny,) filed a bill on the equity side of the *Washington County Court*, on the 10th June, 1828, against the *Baltimore and Ohio Rail Road Company*, denying the right of that company to construct its road on the route it had adopted, and just caused to be partially surveyed, and laid down in the valley of the *Potomac* from the *Point of Rocks* to *Cumberland*, upon the *Maryland* shore; and asserting a prior and paramount right to the choice of a route for the canal, in and along the valley of the *Potomac*—and obtained an injunction, granted by one of the associate judges of that court, prohibiting and enjoining the *Rail Road Company*, its agents and attorneys, and all persons acting by its authority, from making any contracts or agreements with, or receiving any deed or conveyance from any person or persons whatsoever, for any lands or tenements lying within the bounds already so marked out, and surveyed for the said road; and also the justices of the peace, and sheriffs of the counties of *Frederick*, *Washington*, and *Alleghany*, from issuing or executing any warrants, for the condemnation of any such lands, until a reasonable time should have been allowed the *Canal Company*, for completing the actual surveys and definitive locations of the canal, and the further order of the court.

That bill was not answered, but on the 23d June, 1828, the *Rail Road Company* filed a bill in chancery, against the *Canal* and *Potomac Companies*, referring to it, and praying an injunction, prohibiting those companies and each of them, and all persons acting under their authority, or the authority of either of them, from making any contract or agreement with, or receiving any deed, or conveyance, from any of the parties to the contracts before made with the agent of the *Rail Road Company*, for any lands, or any interest in any lands, owned by them, or either of them, and lying within the limits of the actual location of the rail road, as surveyed and marked out by the engineers in the service of that company; and also prohibiting the justices of the peace, and sheriffs of *Frederick*, *Wash-*

ington, and *Alleghany* counties, from issuing or executing any warrant or warrants for the condemnation of any such land, for the use of the *Canal* and *Potomac Companies*, until the claim of those companies to a priority and right of election as set forth in their bill, filed in the *Washington County Court*, should have been finally heard and determined upon, or until the further order of the Court of Chancery.

On the 24th June, 1828, a second bill was filed by the *Rail Road Company*, for an injunction to protect rights, that it was supposed to have acquired under the proceedings that had been instituted by its agents, for the condemnation of such portions of the land surveyed for the site of the road, as they had been unable to make contracts with the owners for ; and on the 25th of the same month, a third bill was filed by the same company, for an injunction to protect rights claimed to have been acquired to lands, by actual locations for the site of the rail road, but in relation to which, no contracts had been made, or proceedings for condemnation instituted—upon each of which bills an injunction was issued, according to the prayer of it.

The complainant in neither of those bills of complaint, sets up any paramount right of election or pre-emption for the route or site of the road; but founds its claim to a right to construct the road in the valley of the *Potomac*, along the *Maryland* shore, from the *Point of Rocks* to *Cumberland*, upon the actual surveys it had caused to be made on that route, as partial locations of the road; upon the contracts made by its agents, with the owners of portions of the land so surveyed, for the title to, or right of way over them, and upon the proceedings instituted by its agents for the condemnation of other portions, in relation to which, they were unable to make any contracts with the owners. The three bills were afterwards consolidated, and on the 8th of May, 1829, the *Canal Company* having then received from the *Potomac Company* a surrender of its charter, and a transfer of all its rights and interests, put in

its answer re-asserting a prior and paramount right to the choice of a route and site for the canal, in the valley of the *Potomac*, as claimed in the bill filed in the *Washington* County Court, to which there was a general replication. At the September term, 1825, after a previous argument, on a motion to dissolve the injunction, the injunction was continued by order of the chancellor, until final hearing; and on the final hearing at the September term, 1831, it was, by a decree of the chancellor, made perpetual. From which decree the case was brought by appeal to this court.

It appears that there are, between the *Point of Rocks* and *Cumberland*, in the valley of the *Potomac*, on the *Maryland* shore, between forty and fifty miles of narrow, difficult passes, along which the canal, if made independently, and without reference to a rail road, will, from the character of the difficulties presented, have to be supported by embankments, constructed in the bed of the river, many feet beyond the usual low water mark; that should the *Rail Road Company* prevail in establishing a choice of location on that route, if it would not be impossible to construct the canal along those passes, after the most eligible ground had been occupied by the rail road, it could only be done with such difficulty, and at such an expense, as that no practical engineer would recommend it, and that the expense of constructing the canal, if taken out of the valley of the *Potomac*, would be so enormous, as in the language of one of the engineers, to render such an undertaking, “a canal impracticability.”

The question then presented for the consideration of this court is, whether the *Chesapeake and Ohio Canal Company*, has a priority of right, in the choice or selection of ground for the route and site of the canal in the valley of the *Potomac*. The decision of which question is approached, with a due sense of the extent, diversity, and magnitude of the interests involved, (reaching far beyond the confines of this State,) and the possible consequences both to the immediate parties and the community at large. Should the decision of this cause, have the effect to arrest the progress

of the great work, commenced by the party against whose claim it is pronounced, it will be a matter of regret. But it is the business of a judge to endeavor in every case that is brought before him, to arrive at a correct conclusion; and that done, to the conviction at least of his own mind, his duty, though sometimes an unpleasant, is a very plain one, and admits of no hesitating in the discharge of it.

Proceeding then to the discharge of an obvious duty, as this case mainly depends upon the construction proper to be given to the several charters, under which, the rights asserted by the respective parties are claimed; and as the *Canal Company* claims to be entitled to all the rights and privileges originally granted to, and vested in the *Potomac Company*, it is necessary to inquire into the character and object of the charter of that company, and to ascertain what the rights and privileges granted were, (so far as concerns this controversy,) and how, and for what cause to be divested, and that charter being also the first in order in point of date, it will be first examined; a correct understanding of which, will essentially aid in the construction of the charter of the *Canal Company*. One construction given to the charter of the *Potomac Company*, by the counsel for the *Rail Road Company*, and insisted on in argument, is, that the *Potomac Company* was not authorised to make a continuous canal, but was restricted to the improvement of the navigation of the *bed* of the river, with no power to make canals, except at the *Great* and *Little Falls*; and for that construction, the phraseology of the title, and of the 9th, 10th, and 17th sections, is principally relied upon. But that construction, it is believed cannot prevail, if the whole of the charter is examined together, and one part construed by another, (as every statute should be,) with a view to give effect and operation to the whole, if it can be done. In pursuance of which principle of construction, it is proposed to collate the title, with the preamble and the different provisions of the charter, having any relation to this point.

The charter itself is, “an act for establishing a company *for opening and extending the navigation of the river Potomac,*” and the preamble states, “that the *extension of the navigation of the Potomac river*, from tide water to the highest place practicable on the north branch, will be of great public utility;” and that “it may be necessary to *cut canals, and erect locks, and other works*, on both sides of the river.”

The 4th section authorises the president and directors “to agree with any person or persons, on behalf of the company, to *cut such canals, and erect such locks, and perform such other works as they shall judge necessary for opening, improving and extending the navigation of the said river* above tide water, to the highest part of the north branch to which navigation can be extended, and *carrying on the same, from place to place, and from time to time, and upon such terms, and in such manner, as they shall think fit.*”

The 9th section provides, that “in consideration of the expenses the said proprietors will be at, not only in *cutting the said canals, erecting locks, and other works for opening the different falls of the said river, and in improving and extending the navigation thereof*, but in maintaining and keeping the same in repair,” &c., the president and directors shall have a right, “*at all times forever,*” to *demand and receive tolls* at the nearest convenient place below the mouth of the south branch, and at or near *Payne’s falls*, and at or above the *Great Falls* of the river, &c.

The 10th section declares, “that the river and the works to be erected thereon, when completed, shall forever thereafter be esteemed and taken to be navigable, as a public highway.”

The 17th section is in these words, “that the tolls herein before allowed to be demanded and received at the nearest convenient place below the mouth of the *south branch*, are granted, and shall be paid on condition only, that the said *Potomac Company* shall make the river well capable of being navigated in dry seasons, by vessels drawing one foot

water, from the place on the north branch, &c., to and *through* the place which may be fixed on below the mouth of the south branch, for receipt of the tolls aforesaid; but if the said river is only made navigable as aforesaid, from *Fort Cumberland*, to and *through* the said place below the mouth of the south branch, then only two-thirds of the said tolls shall be there received; that the tolls herein before allowed to be demanded, and received at or near *Payne's* falls, are granted, and shall be payable, on condition only, that the said *Potomac Company* shall make the river well capable of being navigated in dry seasons, by vessels drawing one foot water, from the said place of collection near the mouth of the south branch, to and *through Payne's* falls aforesaid; that the tolls herein before allowed to be demanded and received at the *Great Falls*, are granted, and shall be payable on condition only, that the said *Potomac Company* shall make the river well capable of being navigated in dry seasons, from *Payne's* falls to the *Great Falls*, by vessels drawing one foot water, and from the *Great Falls* to tide water; and shall, at or near the *Great Falls*, make or cut a canal, twenty-five feet wide, and four feet deep, with sufficient locks if necessary, each of eighty feet in length, sixteen feet in breadth, and capable of conveying vessels or rafts, drawing four feet water at the least; and shall make, at or near the *Little Falls*, such canal, and locks if necessary, as will be sufficient and proper, to let vessels and rafts aforesaid into tide water, or render the said river navigable in the natural course."

And by the 18th section it is enacted, "that, in case the said company shall not begin the said work within one year after the company shall be formed, or if the *navigation* shall not be *made and improved* between the *Great Falls* and *Cumberland*, in the manner herein before mentioned, within *three years* after the said company shall be formed, then the said company shall not be entitled to any benefit, privilege or advantage under this act; and in case the said company shall not complete the navigation *through* and from

the *Great Falls* to tide water *as aforesaid*, within *ten years* after the company shall be formed, then shall *all the interest* of the said company, and *all preference in their favor, as to the navigation and tolls, through and from the Great Falls* to tide water, be forfeited and cease.”

It is very certain, that there is nothing in this charter, *requiring* of the company to make a continuous canal, nor is it insisted upon here, that any such duty was imposed. All that is contended for, is, that no specific mode of improvement was designed by the legislatures from which the charter emanated, and that, the sphere of the operations of the company was not restricted to the bed of the river, and to the canals required at the *Great and Little Falls*; but that, authority to effect the proposed extension of the navigation, either by means of a continuous canal, or by improvements in the bed of the river, with such occasional canals, and at such places, as might be deemed proper, and necessary to the accomplishment of the end contemplated.

The right to improve the navigation in the bed of the river, was clearly comprehended in the powers delegated to the corporation; and that seems to have been considered as the mode of improvement, which would probably be pursued. Upon which hypothesis, it may be inferred, the *obligation* (to be found in the 17th section,) to make canals at the *Great and Little Falls* was imposed, where it was believed, that no safe and adequate improvements could be made in the bed of the river. But the question is not, what it was supposed, would be the mode of improvement resorted to, but whether the operations of the corporation were limited to the bed of the river, or whether it had a right, in the practical exertion of its powers, to adopt any other plan, as it became instructed by experience, and aided by the light of science.

It is laid down in some of the books, that in construing a statute, the title (being no part of it,) is not to be regarded, but we have high authority in this country for a different rule of construction—the opinions of the judges of the

Supreme Court, as expressed in the *United States vs. Fisher*, 2d Cranch, 358. It is no where pretended, that the title can control the express words of the enacting clauses. Without stopping, therefore, to inquire how far the title of a statute may be regarded in the construction of it, but yielding to the title in this case, all the influence that can be claimed for it, it will be found not sufficient to sustain the construction of the charter contended for by the counsel for the *Rail Road Company*.

It is described in the title, to be an act “for opening and extending the navigation of the river *Potomac*,” and whatever might be the ordinary understanding of the terms, “the navigation of the river *Potomac*,” if considered independently and alone, the preamble which more fully discloses the object contemplated, and which is deemed to occupy so important an office in a statute, as to be called a key to its construction, explains the sense in which these terms were intended to be used, by the recital “that it may be necessary to cut canals, and erect locks and other works on both sides of the river,” and clearly shows, that the navigation proposed to be opened and extended was not intended to be restricted to the channel or bed of the river; but that by “the navigation of the river *Potomac*,” was meant a communication by the waters of the river, whether in the natural course, or by means of occasional canals, or both, as it might be found necessary—since the canals spoken of on both sides of the river, could only be necessary for the purposes of navigation out of the bed of the river; and are specified as works, that might become necessary, not for the purposes of canal navigation, as distinguished from the navigation of the river, but as necessary for opening and extending the navigation of the river itself.

It was no doubt expected, that improvements in the bed of the river, would be resorted to; but it was also apprehended, if not foreseen, that the object could not be effected throughout, in that way; and canals were suggested, as means that might become necessary, to the accomplishment of the

scheme of opening and extending the navigation of the river.

If then the construction of the charter rested upon the title and preamble alone, with no other guide to the intention of the makers, there would be no difficulty in ascertaining what that intention was, if there were ambiguous expressions in the enacting clauses, requiring the aid of the preamble to explain them. Not only, however, does the *preamble* sufficiently explain the sense, in which the words “the navigation of the river *Potomac*,” were intended to be used; but the 4th section conferred the express and unlimited power, “to cut such canals, and erect such locks, and perform such other works,” as should be judged necessary by the corporation, “for opening, improving, and extending the navigation of the river,” from tide water to the highest practicable point on the north branch, and “carrying on the same, from *place to place*, and from *time to time*, and upon such terms, and *in such manner*, as they should think fit.”

Here then was distinctly granted the power to make canals, &c., for the purpose of “opening, improving, and extending the navigation of the river”—with no restriction, either as to the number, or kind of canals, locks, or other works, authorised to be made and performed, but such as might be prescribed by the judgment of the corporation, and the places, times, and manner of conducting the improvement were committed to its will, “for carrying on the same, from place to place, and from time to time, in such manner as they shall think fit.” Thus manifestly showing, that to make the *water* of the river navigable by means of a *canal*, or *canals*, would be to make the *river* navigable, in the sense in which the words were used—and showing also, that the *manner* of effecting that object, was referred to the judgment and discretion of the corporation.

The makers of the charter very well knew, that there were various modes of improving the navigation of a river, and that canalling was one; but not being possessed of the means of determining which of the different modes was

best adapted to the situation and character of the *Potomac*, prudently forbore to describe any specific mode, but committed the whole subject to the judgment of the corporation, regardless of the mode, provided the object was accomplished.

Under the authority thus conferred, looking to the 4th section alone, or in connexion with the preamble, can it be doubted, that the corporation might have adopted any plan of improvement, which in its judgment, was best adapted to the end proposed? The language of that section is as broad as it could well have been; without a word to restrict the operations of the corporation to the bed of the river, or to confine it to any particular mode of improvement. It might have resorted to improvements of the navigation in the bed of the river by sluices; or to dams and locks. Both of which kinds of improvements, are comprehended in the terms "such other works." Or it might have adopted the plan of opening the bed of the river, with occasional canals, under the authority to "cut canals, &c." and having the power to "cut such canals as it might judge necessary" for improving the navigation of the river, and to carry on the improvement "from place to place, and from time to time, and in such manner as it should think fit," why might not a continuous canal have been made? If at one time, it had made a canal to a particular point, and afterwards had "thought fit" to make another, from that point to another point, joining the two together, in other words, elongating the first; and so on, from time to time, and from place to place, as it had "judged necessary" or "thought fit," throughout the whole geographical extent of the charter, it would have been a continuous canal.

And could such a work have been deemed to be unwarranted by the charter? It would have been an improvement within the letter of it: such as the corporation "judged necessary," and "carried on from place to place, and from time to time," in the "manner it thought fit." Or suppose the corporation, "judging it necessary, and thinking fit" to

do so, had made a number of canals at different places, between the two *termini* of the proposed extension of the navigation; and afterwards from experience, “judging it necessary” to make other canals in the intermediate spaces, have “thought fit” to do so, and to unite them with those that were before made, it would have been a continuous canal, and what would there have been opposed to the legality of it. The corporation had an unlimited discretion as to the number of canals, and the time, places and manner of making them; no number was specified, no time was limited, no place or places designated, nor manner directed, and having the right to make as many as it should “judge necessary,” and at such places as it should “think fit,” the having made some at some places, did not prevent its making others, at other places, and at other times; one place being as much within its discretion as another, and the making them from one to another of those that had been before made, being the making of them “from place to place:” and the joining them together being within the authority to make them in “*such manner as it should think fit*,” there being not one word denying the right to do so; and surely, there can be no difference in principle between the right to make a continuous canal, by constructing one piece at one time, and another at another time, and in different places, as the necessity for it is discovered, and in such a manner, as ultimately to unite all the different parts, and to adopt at once, the plan of a continuous canal. They are in effect the same, each being referred to, and made dependent upon the judgment and will of the corporation, by the unlimited terms in which its powers are expressed.

It is not enough to say, that the state of knowledge on the subject of canals, was not such at the date of the charter, as to justify the supposition that a continuous canal was thought of at the time, and therefore as has been suggested, that the respective legislatures could not have intended to confer the power to make such a canal. The state of knowledge certainly was not then, what it is now; experience and the

advance of science have shed much additional light upon the subject. But continuous canals were not unknown; they were in practical operation elsewhere, and had been long before, though the extent of their superiority over other modes of improving the navigation of rivers, was not probably well understood; which was perhaps the very reason why such a canal was not *expressly* designated; and may account for the unlimited discretion given by the charter; the makers and procurers of it, being unwilling for want of better information than was then generally possessed, to confine the corporation to any specific mode of improvement. Nor can any inference against a grant of power to make a continuous canal, be drawn from the limited amount of the capital, provided by the second section, as is supposed, since the sixteenth section authorises an indefinite extension of it, at the discretion of the corporation.

The 9th section contains nothing, adverse to the power to make a continuous canal. The right to demand and receive tolls was given, in consideration of the expenses the corporation would be at, "in cutting the said canals, &c." What said canals? Not at the *Great* or *Little Falls*, or any other particular falls, but the canals before authorised by the 4th section, without reference to any falls; such as the corporation "should judge necessary for opening and improving the navigation of the river," to be made and "carried on from place to place, and from time to time, and in such manner as it should think fit." That is one of the enumerated probable subjects of expense, in consideration of which the tolls were allowed; and the "*erecting locks and other works*, for opening the different falls of the river," are others. Showing indeed that it was *supposed*, that *different* modes of improvement might be resorted to; but precluding neither, and excluding the idea, that the improvements were to be confined to the bed of the river; and entitling the corporation to tolls, on the accomplishment of the object, the extension and completion of the navigation of the

river, in either of the known modes, or by a combination of any of them.

The 10th section, in making “the river, and the works to be erected thereon, when completed, a public highway,” proceeds upon the same idea, that the *navigation of the river*, might be opened by a resort to different modes of improvement, and provides for the event of its being done in the bed, and by occasional works out of the river, by declaring both the river and such works, to be a public highway, which would equally cover the case, of its being done in either of the different modes. If it had been effected by improvements confined to the bed of the river, the *river*, under that provision, would have become a public highway, though there were no works on the out side of it; and so, if it had been accomplished by a canal, altogether out of the river, with no improvements in the bed, that *canal* would have been a public highway. It could not have been intended, that to constitute the proposed channel of communication a public highway, there should be improvements both in the *bed of the river*, and upon the margin; and if either exclusively, would have been sufficient, so would the other. It was the channel of communication when completed, that was to be a public highway, no matter by which of the different modes.

But it is supposed, there is something in the 17th section, indicating the intention to have been, to restrict the corporation in its improvements, to the bed of the river, with the exception only of the points at the *Great and Little Falls*. There is no such express restriction to be found in that section. The most that could be gathered from it, is by a remote inference from general and ambiguous words construed alone; which would be a departure from the acknowledged rule, that in construing a statute, all the parts should be taken together.

The words of the 17th section which are relied upon, as proving the intention to have been to confine the improvements to the bed of the river, are, “that the tolls, &c. are

granted, and shall be paid on condition only, that the said *Potomac Company* shall make the river well capable of being navigated in dry seasons, by vessels drawing one foot water, “from *Cumberland*, to and through a place below the mouth of the south branch, from thence to and through *Payne’s Falls*, from thence to the *Great Falls*, and from the *Great Falls* to tide water; the expressions, “shall make the river well capable of being navigated,” being considered as meaning, according to the ordinary acceptance of the terms, that the river should be made navigable in its bed or natural course. But would that be the ordinary acceptance of the terms?

When we speak of *navigating* a river, without reference to the state or condition of it, ordinarily the navigating it, in its natural course is meant. But when the *making* a river navigable, (which was not so before,) is spoken of in general terms, without a designation of any particular mode of doing it, no particular mode is understood to be intended; the making it navigable in its natural course, no more than the making it navigable in any other way, there being various modes of making a river navigable; and indeed, to say that such a river is *made* navigable, or may be *made* navigable by means of a canal, is a common mode of expression. It is therefore by no means clear, that the words of the 17th section, if standing alone, with nothing to explain the sense, in which they were used, should be understood, as requiring the river to be made navigable in its bed or natural course; but when taken in connexion with the whole context, it seems to be very plain, that they were used in no such restricted sense; and that by requiring the *river to be made navigable*, was meant the *making it navigable*, in any of the known modes, in which the navigation of a river may be improved, and not exclusively in its bed or natural channel. It is stated in the preamble, that “*it may be necessary to cut canals, and erect locks, and other works,*” for extending the navigation of *Potomac* river; which shows the understanding of the respective legislatures to have been, that the

extension of the navigation might be effected by making canals.

By the 4th section, the corporation was invested with power "*to cut such canals, and erect such locks, &c.*" as it should judge necessary, for *opening, improving, and extending the navigation of the river, "from place to place, and in such manner as it should think fit;"* and by the 11th section, authority was given to purchase or condemn lands, for the purpose of making such canals, &c. Here then is an express authority to *open, improve, and extend the navigation of the river*, by means of *canals, locks, and other works*; embracing the variety of modes, in which rivers are capable of being made navigable, and exclusively confined to neither.

With this explicit legislative exposition of the sense, in which the terms *opening, improving, and extending, the navigation of the river*, were used, fixing the meaning imparted to that language, by the makers of the charter, to have been, that *to make a navigable canal* fed by the waters of the *Potomac*, would be to *make the river navigable*; how can it be said, that the 17th section in requiring the river "*to be made capable of being navigated,*" meant exclusively that the *bed* of the river should be made navigable? Besides, under the 4th section, the corporation had an unlimited discretion, co-extensive with the geographical limits of the charter, to make canals, "*from place to place,*" for *opening, improving, and extending the navigation* of the river; there was not a spot from one *terminus* to the other, to which the exercise of that discretion was confined, nor from which it was excluded. But it had an express right to make canals, wherever it should think fit, and "*from place to place,*" along the whole route; which is utterly at war with the construction claimed to be put upon the 17th section, and both cannot stand. For it will be observed, that the terms of the 17th section, cover the entire space between *Cumberland* and tide water; and if the construction contended for, of that section, could be sustained, if by requiring that "*the river*

should be made capable of being navigated,” was meant that the *bed* of the river alone should be made navigable, to the exclusion of every other mode of improvement, except at the *Great and Little Falls*, where canals are *required* to be made, there would not be a spot left to the corporation throughout that whole distance, for the exercise of its discretionary power, to *make such canals*, &c. as it might judge necessary for *opening, extending, and improving the navigation of the river,*” and “from place to place, as it should think fit”—which would be a virtual repeal of so much of the 4th section. It would be to alter and narrow down the positive and express enumeration of powers contained in that section, by mere implication from ambiguous expressions to be found in the 17th. But when the two sections are examined together, and the language of the 17th, taken in the sense in which the 4th shows it to have been used, construing one by the other, as must be done, the intention is plainly seen to have been, that the river should be made capable of being navigated in any of the modes authorised by the 4th section. By which construction both will stand, and full effect and operation be given to every word of each. But without the aid of the 4th section, the conclusion of the 17th clearly explains the sense in which the preceding expressions were used. The words are these, “and shall make at or near the *Little Falls, such canal, and locks*, if necessary, as will be sufficient and proper to let vessels and rafts aforesaid into tide water, or *render the said river navigable in the natural course,*” one or the other. Thus presenting the alternative of making the *river* navigable by a *canal*, or of making it navigable in its natural course—and distinctly indicating, that to make navigable canals fed by the water of the river, would be, to make *the river navigable*, in the sense of the charter. And the language of the 18th section is, that “in case the said company shall not *complete the navigation, through* and from the *Great Falls* to tide water as aforesaid, then, &c.” What was here intended? Was it, that the *river* should

be made navigable *in its natural course, through, and over the Great Falls?* Certainly not; but that the *navigation of the river* should be *completed by means of a canal*, at or near the *Great Falls*," as directed by the 17th section—otherwise the 18th section would have had the effect to abrogate so much of the 17th, as provides for the improvement of the *navigation of the river* at the *Great Falls*, by a canal out of the natural course. The same may be said of expressions contained in some of the supplements, which have been called in aid of a different construction; such, for instance, as the proviso in the 6th section of the act of this State of 1790 *ch* 35, relative to the application of the tolls, &c. to the improvement of the navigation of the branches of the river; "that no such application shall be made, until *the main river from tide water, is cleared to Fort Cumberland.*" The main river, how cleared? certainly not exclusively in its bed or natural course; because the 17th section of the original charter, expressly provides for the clearing or improving of the navigation, by *canals* at the *Great and Little Falls*—and the 4th section as explicitly authorises the doing so, *from place to place* throughout the whole distance from one *terminus* to the other. But *cleared*, in the sense of the original charter, that is, in either of the modes therein recognized, for the improvement and extension of the navigation; and in reference to which, those expressions must be understood as having been used. And so of similar expressions contained in other supplements, all of which must be construed with reference to the original act. Nor can any adverse argument be drawn from the preamble to the act of 1802, *ch.* 84, reciting, that the object of the charter had been accomplished; notwithstanding it appears, that no continuous canal had, at that time, been made. It does not profess to state, that the corporation was restricted to any specific mode of accomplishing it, or in what way it had been done; and whether effected by means of a canal or canals, or by improvements in the bed of the river, the object would equally have been accomplished.

But the act of November session 1811, *ch.* 208, which gave to the corporation "*the same power*" to make canals on the *branches* of the river, that was given by the 4th section of the original act, to make canals on the river itself, plainly shows the understanding of the legislature of this State to have been, not that the corporation was confined in its improvements to the bed of the river, or that its power to make canals was limited to the points of the *Great and Little Falls*, as has been supposed in argument, but that it had a right to make them wherever it "*should think fit*," without restriction. Otherwise the grant of power, to make canals on the branches of the river, was perfectly nugatory; since if the power given by the 4th section of the original act, was limited to the making canals at the *Great and Little Falls*, which are points of difficulty in the *main river*, "*the same power*" could not be exercised on the branches.

So that the legislature, in giving to the corporation by the act of 1811, "*the same power*" to make canals in relation to the branches, that was given by the 4th section of the original act, in relation to the river itself, must have intended the same power "*as expressed in that section*;" that is, the power to make canals, wherever it should be deemed necessary. Considering the power there *expressed*, to be the power *given*, according to the unrestricted sense of the language used; and not altered or diminished by the 17th section, so as to reduce it to the power of making canals at the *Great and Little Falls* only.

Taking the charter then altogether, and construing one part by another, if there had been a canal or canals made along the shore of the *Potomac*, fed by the waters of the river, and capable of being navigated in dry seasons, by vessels drawing one foot water, the *river* would have been made navigable for vessels of that description, in the obvious sense, in which the language adopted by the respective legislatures was used; although not a drop of water was left to flow in the natural channel, not being required to be

kept there. The great object in view was, the extension of a water communication from the tide water of the river *Potomac*, up to the highest practicable point on the north branch; and the means, such as might be considered by the corporation, necessary, and proper for the accomplishment of that object, whether by sluices, by dams and locks, or by canal navigation, which is apparent in the preamble, and is carried out into the enacting clauses. There is nothing in the charter, to restrict the operations of the corporation to the bed of the river, and thus to alter or narrow the powers, expressly enumerated and granted in the 4th section; but the whole matter was committed to its judgment; and so that the end was accomplished, it was immaterial, by which of the *means* that were subject to its discretion. If this is the true construction of the charter, the *Valley of the Potomac*, from tide water to the highest practicable point of navigation in the north branch, was specifically appropriated, to the object contemplated,—and at the time the company was formed, or became incorporated, it acquired a vested right, (not the actual legal title to the land,) but a vested right to acquire land by purchase or condemnation, along the shores of the river, to be exerted wheresoever and whensoever it should be thought necessary and proper for the purposes of the charter. The object being an extension of the navigation of the river, by such means as should be found best suited to the purpose, corresponding powers were given to the corporation.

It is apparent throughout the charter, that it was *supposed* the *bed* of the river would, or might be occasionally adhered to; and it was as clearly *intended*, that any *canal* or *canals*, that it might be thought necessary and proper to resort to, should be made along the shore or shores of the river—thus plainly designating the *Valley of the Potomac*, for the route of the contemplated improvement, and dedicating the river and its shores to that object. This is manifested by the preamble reciting that, “*the extension of the*

navigation of the Potomac river will be of great public utility," and that "*it may be necessary to cut canals, &c. on both sides of the river,*" which could only be done in connexion with the river, by making the canals in the valley; by the 4th section, giving the power to make *canals* and *any other improvements* (in, or out of the bed of the river,) wherever it should be thought necessary and proper, for *opening* and *extending* the *navigation*, from tide water to the highest practicable point on the north branch. Thus by confining each end of the proposed extension of the navigation, to a point upon the river, one at tide water, and the other on the north branch, requiring, that in whatever way effected, it should begin and terminate upon the river; and pointing to the valley of the river, from one extremity to the other of the intended improvement, for the location of the canals authorised to be made; as the river itself, if any where resorted to for the purpose of being navigated in its natural course, could not in the nature of things, be used in connexion with any canal or canals, not constructed upon its borders, or within the valley.

By the 9th section, which in consideration of the expense of cutting canals, erecting locks, and other works "for *opening the different falls of the river,*" and of improving and extending the navigation thereof, vests such canals and works in the proprietors of stock and their heirs, and entitles the corporation "to demand and receive tolls at the nearest convenient place below the mouth of the south branch, and at or near *Paynes' Falls*, and at or above the great falls of the river *Potomac* for all commodities transported through either of these places;" thereby plainly indicating the valley of the river, for the construction of the canals and others works—works *for opening the falls of the river*, being evidently works to be erected in the valley of the river; and the places designated for the demand and receipt of tolls upon commodities passing through them, being points upon the river.

By the 10th section, declaring “that the said river, and the works to be *erected thereon*, when completed, shall forever thereafter, be esteemed, and taken to be navigable as a public highway.” The works to be *erected upon the river*, and on the supposition, that the bed of the river would be occasionally used, the *river* and *the works* to be one continual highway; which could not be, unless the works were to be constructed in the valley, so as to admit of a connected navigation with the river.

By the 12th section, giving authority to the corporation to acquire land by purchase or condemnation, at the different places before designated *on the river*, for the demand and receipt of tolls, for the purpose of erecting toll houses; the very purpose and object of which, would require them to be built on the line of the projected extension of the navigation; and the authorising them to be built at certain points upon the river, indicating the valley as the route of that line, whether accomplished by improvements in the bed of the river, or by canals, &c. along the river, or by both; and by the 17th and 18th sections, the former requiring as a condition precedent to the right, to demand and receive tolls, that the river should be made navigable from the upper *terminus*, to and through a place below the mouth of the south branch, thence to and through *Payne’s Falls*, thence to the *Great Falls*, (the several places on the river before designated for the receipt of tolls, and the erection of toll houses,) and from the *Great Falls* to tide water, the other *terminus*; and requiring a canal to be made at the *Great Falls*, and also a canal at the *Little Falls*, or the river to be rendered navigable in the natural course; and the latter providing that, if not done within the respective periods therein prescribed, in the manner, and from and to the places specified in the 17th section, the corporation “*should not be entitled to any benefit, privilege or advantage under the charter*, and that “all its interests, &c.” should “be forfeited and cease.” Thus, by requiring the proposed improvement, (by whatever means accomplished,) to be

made throughout its whole course, from one point upon the river to another, and requiring also canals to be made at specified points *upon the river*, (*the Great and Little Falls*,) distinctly confining it to the valley of the *Potomac*, and designating and appropriating *that* region, as its route. The 13th and 19th sections might also (if necessary,) be resorted to, for the purpose of showing the intention, that any canal or canals, which it might be thought necessary to make, should be constructed *along the river*, and of course in the valley. And the supplemental act of this State, passed at the November session, 1785, speaking of the canals to be made *at the Great and Little Falls*, "*supplied by the current of the river*," and "*communicating again with the river by locks*, if necessary," and the further supplementary act, passed at the November session, 1811, giving to the corporation, the same powers to acquire and condemn lands, for the purpose of making canals, *upon the branches of the river Potomac*, as those conferred by the 4th, 11th, and 13th sections of the original act, for "*making canals on that river*," explicitly show, what was the understanding of the legislature of *Maryland*, in relation to the location of the contemplated works.

The valley of the *Potomac* being thus marked out for the sphere of the operations of the *Potomac Company*, without restriction to any particular mode of improvement, the corporation had a right to select in the first instance, either of the various modes of improving the navigation of the river, and if that failed, or proved insufficient, to resort to another, and so on, until the object of its incorporation was effected. It was not not *put to an election* between the different modes of improvement; nor concluded by any selection it might make, from having recourse to another, if that should fail. Such a construction of the charter would be too narrow for the great object in view. It cannot be believed, that the respective legislatures intended to limit the powers of the corporation, to any experiment it might make, in the prosecution of a work of such great and acknowledged public

utility, the means of accomplishing which, were then but little understood in this country; and to deny to it, the right of completing it in any other way, if such experiment should fail; and thus to defeat the whole project, after heavy expenses had been incurred, in an honest, but unsuccessful effort to accomplish it, and at a time too, when a knowledge of the best and most effectual mode of doing it, could only have been acquired from lessons of experience; the scheme itself being but an experiment, and that a hazardous one to the undertakers.

It is believed, that no company could have been found, with such an understanding of the charter, and that there is nothing to be found in it, to sustain such a construction. But on the contrary, that the whole subject was committed to the judgment, discretion, and experience of the corporation; with power to execute the work, in such of the various modes, as might in its progress be found to be most expedient; and that this is fully proved by the express provisions of the 4th section, authorising the corporation to “cut such canals, and erect such locks, and perform such other works, as it should judge necessary for opening, improving, and extending the navigation,” “from place to place, and from time to time,” “and in such manner as it should think fit.” Thereby embracing all the different modes of improvement, and empowering the corporation, not merely to elect one particular mode, but to resort to any of the various modes, at such places, and at such times, as from experience, aided by the advance of science, as should be found necessary in the prosecution of the work, though begun on a different plan.

More than forty years having elapsed from the date of the charter of the *Potomac Company*, to the time of its surrender to the *Chesapeake and Ohio Canal Company*, it has been suggested, but not seriously pressed in argument, (as it could not well have been) that, if the *Potomac Company* had originally the right to make a continuous canal, and to procure the condemnation of lands for that purpose, that

right, as well as any other right to condemn lands, and make canals, which was never exercised, had become lost and forfeited by non-user for so long a period. A corporation may *forfeit* its charter by non-user or mis-user of its franchises; but it is well known, that such *forfeiture* can only be enforced by judicial proceedings instituted for that purpose, at the instance of the government, and that no cause of *forfeiture* can be taken advantage of, collaterally or incidentally; and the same principle applies, as well to a question of forfeiture of a particular franchise, as of the whole. Nor is it every non-user, that will furnish a sufficient ground for a judgment of forfeiture. Here, there is no pretence for the assertion of such a cause. The right to improve and extend the navigation of the river, was a franchise granted; the manner of doing it, a mode of exercising that franchise. And there being various alternative modes authorised by the charter, subject, each of them, to be changed at the will of the corporation, no experimental trial of one of those modes, could work a forfeiture of the right to resort to either of the others, during the continuance of the charter. So long as the charter remained in force, there could be no *forfeiture* of the right to exert the franchise, in either of the authorised modes, which still remained to be tried; but all the rights and powers it conferred, continued in like manner, and so far from there being any ground for a forfeiture of the *charter*, by *non-user*, the very employment of *some* of the authorised modes of improvement, was a practical exercise of the franchise. But considering the right to make a canal or canals, and to condemn lands for that purpose, as a *particular* franchise, and not a means only of executing the general power to improve the navigation of the river; the not having resorted to that mode of improvement, did not amount to a cause of forfeiture on the ground of *non-user*, the power given to the corporation by the 4th section of the charter, to make canals," from place to place, and from time to time, and in such manner as it should think fit," being altogether indefinite both as to place and time,

and leaving it expressly and entirely in the discretion of the corporation, to make such canal or canals as it should judge *necessary, wheresoever* and *whensoever* it should think proper. And the fact, that other expedients were in the first instance resorted to, and for a long time persevered in, cannot be tortured into an abandonment, or any thing equivalent to a surrender of the right to make a canal or canals, whenever such expedients should be found inadequate to the purpose intended, and a canal or canals should be thought necessary to the accomplishment of the object.

If then, the powers originally imparted to the *Potomac Company* by the 4th section of the charter remained unimpaired, that corporation, under the authority “to make such canals as it should judge necessary from place to place, and from time to time,” had a right, at any time it should think proper, during the continuance of its charter, to make a canal or canals along any, or all of the difficult passes upon the river, which form the subject of this litigation; or at any other place or places in the valley, and to purchase or condemn lands for that purpose. And its charter, according to the decision of the Supreme Court in the case of the *Trustees of Dartmouth College vs. Woodward*, 4th Wheaton 518, being a *contract* between the states of *Maryland, Virginia*, and the *Potomac Company*, the obligation of which could not, without the assent of the corporation, be impaired by any act of the legislature of either of the States, nor the concurrent acts of both, consistently with the constitution of the *United States*, declaring that, no State shall pass any “law impairing the obligation of contracts;” the charter of the *Rail Road Company*, could not, without impairing the obligation of that contract, abolish, take away, or diminish the prior and paramount right of the *Potomac Company*, to select and appropriate by purchase or condemnation, any lands in the valley of the *Potomac*, for the route and site of a canal or canals, wherever it should think proper, along the borders of the river, either in terms, or by any construction of it, that would have authorised the *Rail*

Road Company, without the assent of the *Potomac Company*, to occupy any of the difficult passes, or other places along the river, for the route and site of the road, in such a manner, as either to exclude that company from a priority in the choice of a site or sites for the construction of the works authorised by its charter, or in any manner to restrict and circumscribe it, in the exercise of its prior right of election. But such an occupation by the *Rail Road Company* of the valley of the *Potomac*, would have been a violation of the vested corporate rights and privileges of the *Potomac Company*, and the charter of the *Rail Road Company*, in so far as it purports to be, or may be construed in derogation of those rights and privileges, is repugnant to the constitution of the *United States*, and void; there being no difference in principle, between a law, that in terms impairs the obligation of a contract, and one that produces the same effect, in the construction and practical execution of it. And the *Canal Company*, as the assignee of the *Potomac Company*, stands in its place, and is invested with the same prior and paramount right, that was originally granted, and vested in the *Potomac Company*; the 13th section of the charter of the *Canal Company*, authorising a surrender by the *Potomac Company* of its charter, and a transfer to the *Canal Company* of all its property, rights, and privileges, &c. expressly providing, that “thereupon (that is upon such surrender and transfer, and acceptance by the *Canal Company*,) the charter of the *Potomac Company* shall be, and the same is hereby vacated and annulled, and *all the rights and powers thereby granted to the Potomac Company shall be vested in the company hereby incorporated*,” of which it can no more be divested by any operation or construction of the *rail road charter*, than could the *Potomac Company* have been at the time of the surrender and transfer; but it took them, and holds them, in all their integrity and force, as they were held by the *Potomac Company*, unimpaired by the *rail road charter*. Which upon the hypothesis, that the rights and powers

specified in the 4th section of the charter of the *Potomac Company*, had not been altered or restricted, nor lost by that company, is not understood as being denied.

But it is contended, that if the *Potomac Company* did originally possess the power to construct a continuous canal, it had lost that power, and had no right to make any canal or canals, or to acquire any lands for that purpose, by purchase, agreement, or condemnation, at the time of the surrender of its charter, by the deed to the *Canal Company* of the 15th August, 1828, or at the date of the rail road charter; and therefore, that the *Rail Road Company*, either as concerns the *Potomac Company*, or the *Canal Company*, in its character of assignee of the *Potomac Company*, has a right according to the true construction of its charter, to occupy the ground in controversy for the route of the road. Which is asserted upon the assumption, either that the whole of the work authorised to be done, must be taken to have been accomplished, within the times limited by the 18th section of the charter, and extended by the several supplementary laws of *Maryland* to the 1st January, 1813, and of *Virginia* to the 1st January, 1820, and the power to have been thereby fully executed and at an end; or that, if it was not accomplished within the times limited, the franchise of the *Potomac Company* to make canals, and to acquire lands by condemnation for that purpose was forfeited, or had expired by lapse of time—and being gone from the *Potomac Company*, could not, upon the surrender of its charter, vest in the *Canal Company*, which is very plausible, and would be a full answer to the claim of the *Canal Company*, in the character of assignee of the *Potomac Company*, if the whole of the work authorised to be done, was in fact accomplished: for then, it must be conceded, the power would have been fully executed and at an end, or if the *Potomac Company* was, by lapse of time alone, and without the intervention of judicial proceedings, divested of the power to make canals, and to condemn lands for that purpose.

But was there, or could there have been such a divestiture consistently with the principles applicable to questions relating to vested corporate rights? Or was the whole of the work in fact completed, that was authorised to be done, and the entire object of the charter accomplished?

The provisions relied upon in the 18th section, are, that “if the navigation shall not be made and improved between the *Great Falls* and *Fort Cumberland*, in the manner herein before mentioned, (that is for vessels drawing one foot water in dry seasons, as specified in the 17th section,) within three years after the said company shall be formed, then the said company *shall not be entitled to any benefit, privilege or advantage* under this act; and in case the said company shall not complete the navigation through, and from the great falls, to tide water as aforesaid, within ten years after the said company shall be formed, then shall *all the interest of the said company, and all preference in their favor, as to the navigation and tolls*, at, through, and from the great falls, to tide water, be *forfeited* and cease.”

And it is supposed, that the object of the charter was limited to the improvement of the navigation of the river, (whether by canals or otherwise,) only so far as to render it capable of being navigated in dry seasons, by vessels drawing one foot water; that the powers of the company were restricted to that *degree* of improvement, and that, whenever *that* object should be accomplished, the powers of the company would be spent—which is a proposition that must be maintained on the part of the *Rail Road Company*, to support the argument, that the powers of the *Potomac Company* had been exhausted, by a compliance with the condition contained in the 18th section, by reference to the 17th section, which is, “that the river shall be made well capable of being navigated in dry seasons, by vessels drawing one foot water,” within the times specified—otherwise supposing that object to have been effected, or condition complied with, within the time limited, there still remained in that company under the 4th section, a discretionary power

to extend the improvement of the navigation by a canal or canals.

But is that the true construction of the charter? The extension of the navigation of the river *Potomac*, is asserted in the preamble, to be a work of *great public utility*, and the legislatures of *Virginia* and *Maryland*, are declared to be *impressed with the importance of the object*, and to be *desirous of encouraging* so useful an undertaking. The grand object, was a connexion between the *Atlantic States*, and the country west of the *Alleghany* mountains, to be effected in part, by an extension of the navigation of the *Potomac* river; a work not merely of local, but of great national importance, and one which, from its character, and supposed magnitude, drew into exertion the combined action of the states of *Maryland* and *Virginia*. With such an object in view, is it to be supposed, that the legislatures of those states, intended to restrict the powers of the company they were incorporating, to the making the river navigable for vessels drawing one foot water only, an improvement so entirely inadequate to the end contemplated? Was that the *encouragement* proposed to be given to so useful an undertaking? It cannot be believed, and it is but to propound the question, to find the answer. There was no motive, no imaginable necessity for such a restriction, and if intended to be imposed, those legislatures must have been but slightly *impressed with the importance of the object*. Construing the 18th section alone, without regard to any other part of the charter, and construing it most rigidly, it might possibly be tortured into such a meaning. But though the *Potomac Company* was a private corporation, the charter was a public act, granted professedly *pro bono publico*, and should be construed in such a manner, as to attain, as far as possible, the end proposed. *Pierce vs. Hopper, Strange*, 253, 258. *New River Company vs. Graves*, 2 *Vern.* 431. It would not be doing justice to the makers of the charter, in searching for their intentions, to look to the 18th section alone, for the narrowest possible construction of it; but that

section must be construed together with the 4th, by which the general power of improvement was given, in order to arrive at the intention of the makers, and that both may stand, if consistently they can.

Looking then to the unqualified terms of the 4th section, that the president and directors shall have power, &c. “to cut such canals, and erect such locks, and perform such other works, as they shall judge necessary, for opening, improving, and extending the navigation, and carrying on the same from place to place, and from time to time, and in such manner, as they shall think fit,” it is clearly seen, that the right was expressly given to the corporation, by that section standing alone, to improve the navigation by any means, and to any extent in its power, that the river and the region through which it passes would admit of, without limitation either as to manner, extent or time. With that unrestricted power, it might have contented itself, with making the river navigable in its *natural course*, or by means of a canal, or canals, for *vessels drawing one foot water*; or if from experience, that was found to be inadequate to the demands of an increasing commerce, it might have deepened the bed of the river, or any canal or canals that had been made; or if none were originally made, it might have extended the improvement, by a resort to canals, from place to place, and from time to time, as in its judgment, occasion should require, which would seem to have been the very object of the power, to make canals “from place to place, and from time to time;” or it might in the first instance, have resorted to the temporary expedient of making the river navigable in its natural course, for the immediate public accommodation, by vessels of small draft, and at the same time, have adopted the more extended plan of improvement, by a canal or canals; all which it is believed must be conceded, looking to the 4th section alone—and it is not perceived, that there is any thing in the provisions of the 18th section, declaring, that if the river was not made navigable within the respective periods therein mentioned, *for*

vessels drawing one foot water, between the Great Falls and Fort Cumberland, and from the Great Falls to tide water, the corporation should not be entitled to any benefit, privilege, or advantage under the act, and that all the interest, &c. of the corporation should be forfeited and cease, which so abridged the general power specified in the 4th section, to make such canals as the corporation should judge necessary, and at such places and times as it should think fit, as to reduce and limit it to the mere power to make the river navigable for vessels drawing one foot water, and to terminate whenever that should be effected, without any express words of restriction; instead of the more extended power to make such canals, as might be found better suited to the purposes of useful and efficient navigation; and at such times, as the progressive improvement of the country, and consequent increase of internal commerce and intercourse between the two great sections of the United States, which it was the object of the charter to bind more closely together in interest and affection, might indicate a necessity for further improvements, and aid in supplying the means of carrying them on. If that was the effect of the 18th section, it took away by implication, the whole of the discretionary and more beneficial power given by the 4th, and virtually annulled that section. Such a construction and effect, could only be given to the 18th section, by rejecting the 4th from consideration, in violation of the rule, that every statute should be so construed, that no clause, sentence or word, shall be superfluous, void, or insignificant, if it can be prevented; which is too well known and established, to render any reference to authorities in support of it, necessary.

Nor is there any necessity for such a rejection of the 4th section, in order to give effect to the 18th section, but both may well stand. The requiring that to be done, which the corporation had before the undoubted right and power to do, *the making the river navigable for vessels drawing one foot water*, was by no means inconsistent with, or repugnant to the power to make further and more important im-

provements. It was only saying, that, that at least should be done, leaving the corporation in possession of the power given it by the 4th section, to do as much more as it pleased, but not less: and accommodating the navigation afterwards, to vessels of greater draft, (by whatever means effected,) would not have rendered it *less* “capable of being navigated by vessels drawing *one* foot water.” If it could have done so by deepening the bed of the river, or canals already made, (which cannot be doubted,) it might also have done it by making additional canals, where none had been made, there being no restriction perceived in the law itself, of one mode more than the other, but the general power, extending equally and without distinction to all; and for us to make such a distinction, would be to legislate, and not to expound the law as it is given to us. The idea advanced, that to draw off the water from the river, after it was made navigable for vessels drawing one foot water, into a canal of greater depth, would have been a violation of the charter, rests upon the supposition, that the operations of the corporation, except at the *Great* and *Little Falls*, were restricted to the bed of the river, and that it was bound, to entitle it to tolls, to make and keep the river navigable in its natural course alone: which we have already endeavored to show, is not consistent with the proper construction of the charter, but that the corporation had a right to make the river navigable, by means of a canal or canals, and to demand and receive tolls, although no water should be left to flow in the natural course.

Taking then the 4th and 18th sections together, it appears to be very plain, that the intention was not, by the provisions of the 18th section, to abridge the general power, explicitly given in the 4th, to improve the navigation to the utmost extent within the means of the corporation, and in any mode, and at any time, and to limit it to the right only *to make the river navigable for vessels drawing one foot water*; but merely to enjoin as a positive duty, under pain of forfeiture, and to insure an early use of the river, though

upon a limited scale, that it should at least be made navigable to the extent therein required, within the respective times specified; leaving the general discretionary power of further improvement unimpaired, in regard both to extent and mode, and to be executed at any time; or in the language of the 4th section, “from time to time, as the corporation should think fit;” aided by the tolls permitted to be received, and by the 4th section expressly authorised to be applied to that purpose, in these words, “and out of the money arising from the subscriptions, and the tolls, &c., to pay for the same, and to repair and keep in order the said canals, locks, and other works necessary thereto, and to defray all incidental charges.” Which of itself, abundantly shows the intention that the canals, locks, and other works so authorised, might be made and carried on, after *the river should be rendered navigable from Cumberland to tide water, for vessels drawing one foot water*; since that was, by the 17th section, expressly made a condition precedent, to the right to demand or receive any tolls; the canals, locks, and other works, and incidental charges, that were intended “to be paid for, and defrayed,” in part, “out of the money arising from the tolls,” could only have been such, as should be made, and occur after tolls were authorised to be charged, which was not until after the river had been made navigable *for vessels drawing one foot water*. To say it was intended, that the whole of the work authorised should be first completed, and afterwards paid for, with all the incidental charges, out of such tolls as might possibly be received, without a word in the law to that effect, would be a most strained construction. It could not have been known that a sufficient amount of tolls with the subscriptions, would ever be received to discharge the principal and interest of the sum expended upon the work, or that the corporation would be able to borrow money for carrying it on, about which, nothing is said in the charter. It is not therefore to be supposed, that any such speculation was indulged in; but the evident intention was, that the corporation

might carry on the canals and other works *from time to time*, as it should be deemed necessary, and as its pecuniary means, arising from the subscriptions, and the *receipt of the tolls*, should enable it to do so.

The great and general ultimate object was the improvement of the navigation of the river, to the utmost extent commensurate with the means of the corporation, as they should accrue, and to which it should at any time choose to push it; with no motive for limiting the degree of improvement, which could not have been too extensive for the purposes contemplated. The special, and more immediate object, was a partial improvement, not committed to the discretion of the corporation; but required under pain of forfeiture, to be completed as a *positive duty* within the times specified, upon the execution of which alone, without doing any thing more, the corporation was to be entitled to demand and receive tolls, and to all the benefits, privileges and advantages, proffered by the charter. If the river was not made navigable for vessels drawing one foot water, the corporation was to have no “benefit, privilege or advantage, under the charter;” in other words, the charter was to be forfeited; but if that was done within the time limited, then the whole of the charter was to remain in full force; none of the franchises were to be forfeited, and the corporation was to have the benefit of demanding and receiving tolls; and the privilege, if it chose to exercise it, of making any further improvements in its power, according to any mode, and at any time it should think proper.

In this view of the subject, there was no inconsistency, or repugnancy, between the 4th and 18th section; no *clause, sentence or word of either, was superfluous, void, or insignificant*, but each section had its full effect and operation. Under the 18th section, the corporation was *bound* to make the river navigable from *Cumberland* to tide water, *for vessels drawing one foot water at least*, within the times limited, and it might have contented itself, with the discharge of that duty; and under the 4th section, it was *not bound*,

but had *authority* to make *any further* improvements, in any mode or *plan*, and at *any time*, it might have executed that *authority*. But according to the interpretation of the charter on the part of the *Rail Road Company*, the 4th section, in regard to all discretionary power of improvement, whether in relation to, extent, mode, or time, was abrogated by the 18th section, when both might well have stood together, which is not sanctioned by any acknowledged rule of construction.

It is said to be “inconceivable, that the legislature could have intended to give to the company the power, after the navigation was *completed* in one way according to the *requisitions* of the charter, to complete it in another.” That might have been *unnecessary* legislation, if the *charter is to be so understood*, though not for that reason *void*. But it was not the meaning of the charter, that the navigation would then be *complete*, when the river should be made navigable for vessels drawing one foot water only, as it clearly would not. The intention of the makers was, to secure to the public the benefit of a partial use of the river in a reasonable time, by *requiring* under pain of forfeiture, an *improvement* to that *limited* extent at least, within the prescribed periods; leaving it to the corporation, and clothing it with sufficient power and authority for that purpose, to make at any time, what further improvements it could; the more extensive and *complete* the better; but not exacting as a duty, to entitle it to tolls, what it might be unable to accomplish, and what subsequent events have proved, it was not able to effect.—Nor is there any thing very astonishing, or calculated to excite surprise in this. It was exactly what a wise and prudent legislature would have done, not to restrict the powers of the corporation, to the smallest possible improvement suited to any useful purpose, which would have been inconsistent with the great end in view; nor to jeopard the whole enterprize, by *requiring* the work to be *completed* under pain of forfeiture, on the most approved plan,

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and to the utmost extent, within a period that might prove too limited, for the means and capacity of the corporation; nor to leave too much in the discretion of the corporation, by omitting to require any thing to be done within a time limited; which discretion might have been abused by the corporation to the prejudice of the public. And, borrowed as it would seem, from that charter, the same policy of securing to the public, the benefit of a limited use of the river for the purposes of navigation, during the progress of a more extended plan of improvement, has been carried into the charter of the *Chesapeake and Ohio Canal Company*; the 13th section of which has this provision, "and it shall be the duty of the said last mentioned company, (the *Canal Company*) until every section of the contemplated canal shall be completed, so as to be used and enjoyed for the purposes of navigation, to keep the corresponding part of the river, in a proper state for navigation, and in good order as the same now is; and in default thereof, they shall be in all things responsible, in the same manner, as the *Potomac Company* is now responsible."

The different supplementary acts of this *State* and *Virginia*, to the charter of the *Potomac Company*, giving further time to that company, could only have been intended, (and cannot be otherwise construed,) to extend the time for completing *that*, which by the 18th section of the original act, was *required* to be done within the respective times therein limited. And that was, the making "the river well capable of being navigated in dry seasons, by vessels drawing one foot water, from *Cumberland* to tide water," and nothing more. There was no limitation of time for the exertion of the powers given by the charter, except that prescribed by the 18th section; of necessity therefore, the supplements extending the time, had reference to that section, and to the particular work expressly required by it, to be done within the times limited.

The preamble of the act of this *State*, of 1802, *ch.* 84, reciting "that the object contemplated by the act of assembly

for establishing a company for opening and extending the navigation of the river *Potomac*, has been accomplished,” has been much relied on, to show the understanding of the legislature of *Maryland* to have been, that the *object* for which the *Potomac Company* was originally incorporated, was the making the river navigable in its natural course, for vessels drawing one foot water, except where canals were expressly required; no continuous canal having then been made. But, however that preamble might have been understood, taken alone, it is perfectly clear, when construed with the enacting clause, that, that was not the meaning of the legislature. The language of the enacting clause, immediately following the preamble is, “that the proprietors of shares in the said *Potomac Company*, their heirs and assigns, shall, and may demand, take, and receive tolls, at the several and respective places heretofore fixed by law, for the payment, and receipt thereof;” thus manifestly showing, that by the *object* stated in the preamble to have been accomplished, was merely meant, the performance of the condition imposed by the 17th section of the original act, precedent to the right to demand and receive tolls; that is, the making the river navigable for vessels drawing one foot water. And the *particular object*, required by the 18th section to be accomplished within the times specified, on pain of forfeiture of all “*benefit, privilege and advantage* under the act;” with no reference whatever, to the *general authority to make canals, &c.* given by the 4th section, without any limitation of time. And the conclusion of the same enacting clause of the act of 1802, *ch.* 84, is in these words, “and that *all and every* of the *rights, interests, privileges and immunities* heretofore granted to, or vested in, the said proprietors and *Potomac Company*, are hereby confirmed and established to them, their heirs, &c.” including the right and privilege to make a canal or canals, at any time; thus asserting and confirming the existence of that right, upon the assumption that the river had been made navigable *for vessels drawing one foot water.*

The charter was not limited in its duration, but expressly made perpetual by its terms, defeasible only, on failure by the corporation, to accomplish within the time limited, what was required to be done by the 18th section. Which was a *condition subsequent* engrafted upon it, in defeasance of a vested franchise, on breach of which, if in point of fact, there was any act of forfeiture committed by the corporation, it might have been avoided, or forfeited, by *scire facias*, or a *quo warranto*, if the states that granted it, had chosen to take advantage of the non-performance of the condition. But not having done so, the franchise endured, notwithstanding the breach of the condition. And it is like the grant of an estate in land, defeasible on the non-performance of a condition subsequent, strictly speaking, as if an estate be granted expressly upon condition to be void on the happening of a certain event. In such case, it is perfectly clear, that the estate is not defeated by the mere happening of the event, but that the law permits it to continue, beyond the time when such contingency happens, unless the grantor or his heirs, take advantage of the breach of the condition by entry, &c. which cannot be done by a stranger. The proceeding by the government (the grantor,) for the breach of a condition subsequent, contained in a charter of incorporation, is by *scire facias*, or *quo warranto*; by an individual grantor (or his heirs,) of land, by entry.

A private corporation aggregate may be *dissolved*, by the death of all its members, or by the loss of an integral part, whereby it is rendered unable to do any corporate act, or to restore itself by a new election; or a corporation may be *dissolved* by a surrender to the government of its franchise, or by an act of the legislature repealing the act of incorporation, with the assent of the corporation; or it may be dissolved by a forfeiture of its charter, through abuse or neglect of its franchises, as for condition broken; there being a tacit condition in every such grant, that the corporation shall act up to the end of its institution.

But such forfeiture must be judicially ascertained and declared, upon direct proceedings against the corporation for that purpose, in order that it might not be condemned unheard, for an imputed delinquency. Where there is no corporate body in existence, as where it has been *dissolved* by the loss of an integral part, or by surrender, &c. it would be not only useless, but absurd, to go into a court of law, to obtain a judgment of dissolution. But where there is an existing corporation capable of acting, but which has been guilty of an abuse, or neglect of its franchises, or the powers committed to its trust, amounting to a cause of forfeiture, such cause of forfeiture can only be enforced by *scire facias*, or a *quo warranto*, issued at the instance of the government creating the corporation, and cannot be taken advantage of incidentally, or in any other way, or by any individual; since the government, with which alone the contract arising out of the charter is made, may waive the breach of any condition of that contract, and cannot be made to enforce the forfeiture, whether it will or no, and when it may have sufficient reason for not choosing to do so. Until it does, and that by judicial action, and not by legislation, no individual or other corporation, can treat it as a forfeited franchise. This is the doctrine taught by the authorities—among which are, *The King vs. Amery*, 2 Term. Rep. 515. *The King vs. Pasmore*, 3 Term. Rep. 199. *Terret vs. Taylor*, 9 Cranch, 43. *Dartmouth College vs. Woodward*, Wheat. Rep. 518. *Slee vs. Bloom*, 5 John. Ch. Rep. 366. *Same vs. Same*, 19 John. Rep. 456. *The Trustees of Vernon Society vs. Hill*, 6 Cowan's Rep. 23. *McLaren vs. Pennington*, 1 Paige's Rep. 102, and *Angell and Ames on Corporations*.

The opinion of that distinguished jurist *Judge Marshall*, which was used in argument, would be entitled to, and would receive the highest consideration, if the question upon which it was given, arose in this cause. The substance of it is, that as the 11th section of the charter only author-

ised the condemnation of land, through which a canal was *intended* to pass, the condemnation must of course be before the canal was made; and therefore, that if *after* the canal had actually *been made*, and the making of it no longer rested in intention, there could be no condemnation of land on the sides of it; upon the principle asserted, that every law, which is to wrest from an individual his property without his consent, must be strictly construed. The utmost extent to which that opinion could be used, would be to show, that wherever the power of the company to make a canal, had been exerted, it was expended and gone, and could not again be exercised by a further condemnation of land, at the same place. But the question presented here, is not whether the power of the *Potomac Company* to make canals, had, by being exerted, been executed, and was at an end; but whether that corporation retained the power to condemn land, and make canals, where none had before been made.

The penalty annexed to the breach of the condition in the first clause of the 18th section, was, that “the company should not be entitled to *any benefit, privilege, or advantage* under the act;” and in the last, that “all the interest, &c. of the company should be *forfeited* and cease.” Now, to lose all *benefit, privilege, and advantage*; or for all *interest* to be *forfeited and cease*, would be to lose the charter itself. To take away every thing a charter gives, is to take away the charter—and to have taken away all *benefit, privilege, advantage, and interest*, would have been, to take away every thing that this charter gave. A forfeiture therefore of the entire charter, together with the particular franchise to condemn lands and make canals, was the penalty prescribed.

The analogy between this, and the case cited of *Agnew vs. The Bank of Gettysburg*, 2 Harr. and Gill 478, is not perceived. That was the case of a bank charter, of limited duration, which had expired by its own limitation, and with it, the *corporation ipso facto dissolved*; it wholly ceased to exist for any purpose; no corporate powers remained,

no originally vested franchise to be divested, for none were given beyond the term of duration; and no act was necessary to be done, in order to avoid the charter, or *dissolve* the corporation. But this was a corporation in full life, with vested franchises, unlimited in their duration, and liable only to be divested, through failure to *exert* them to a limited extent, within a specified time—and although by matter in *pais*, it might perhaps *stricti juris*, have had no right to exert them; yet none could have questioned the right, but the States that granted the franchises, and with which the contract was made, and which alone could have resumed them, for breach of the condition, on a judgment of seizure—until which was done, the *corporation* continuing to exist, the power to exert the franchises granted, remained.

Suppose for any cause, the rail road, or canal, should not be completed within the time prescribed by its charter; would it be contended that the charter was *ipso facto* forfeited, and the corporation dissolved without any judicial proceedings being instituted for that purpose, and that the State could thereupon grant the same franchises to another company? It is however conceded, that at the date of the surrender and transfer to the *Canal Company*, this was a *subsisting corporation*, with *corporate rights*, and the *power* to exercise them; and it is said, it must now be taken, that the river had then been made navigable for vessels drawing one foot water. If so, every *benefit, privilege, and advantage*, under the act, remained; and among them, the privilege of condemning *land*, and making a canal or canals, at any time; which the corporation was free to exert, where and when, and how it “should think fit,” within the designated region. The expressions, *benefit, privilege, advantage* and *interest*, used in the 18th section, applied as well to the right to demand and receive tolls, and to make the river navigable in the natural course, as to the right to condemn lands for a canal or canals. The terms equally embraced

all the rights and powers of the corporation; if one was to be forfeited, all were to be forfeited; if a term was prescribed for the duration of one, the same term was prescribed for the duration of each. There was no distinction, no exception of one, more than another from the operation of that section. And evidence of their understanding of the 18th section, is furnished by the acts of the legislatures that granted the charter; which show, that they did not consider the franchise as one that was to expire by its own limitation, but viewed and treated it, as a question of forfeiture altogether. Not as a grant of the right or franchise for a *limited time*, to condemn lands and make canals, but as a grant of the franchise for an *indefinite time*, subject to a defeasance, and that the object of the different acts passed for the extension of the time limited by the 18th section, was to guard the corporation against the liability to a *forfeiture* for a breach of the condition.

The 2d section of the act of *Virginia*, passed in November, 1793, for extending the time limited by the 18th section of the charter, has this provision, “and that no *privilege* or *advantage* granted by law, shall be *forfeited* or lost, in case the navigation aforesaid shall be finished within the time hereby limited.” The 3d section of the act of this State, passed at the November session, 1794, *ch.* 29, for the like purpose, has the same provision, and the provision of the 4th section of the act of this State, passed at the November session, 1797, *ch.* 93, is in the same words.

The act of 1814 of this State, *ch.* 75, giving to the company the power to acquire land, by *purchase*, *compromise*, or *exchange* only, which is relied on to show, that the power before granted to acquire land for constructing canals, was considered by the legislature as gone, and extinguished, does not seem to have been correctly attended to. It declares that the company “shall be, and they are hereby authorised and empowered, to use and dispose of the land and water rights, now held by the said company, or which they may hereafter acquire in this State, in the erection of

mills," &c., "and shall be authorised and empowered to acquire lands and other property, *contiguous to the land, canals, and locks on said river, by purchase, compromise, or exchange, &c.* No authority had before been given to the corporation to acquire land in any way, except for the purpose of constructing canals and building toll houses; and the authority given by this last act to acquire land, was not for the purpose either of constructing canals, or building toll houses; but it was an authority to acquire lands *contiguous to the canals and locks on the river*, for the purposes, as it would seem, of the mills, or other water works, which the same act authorised the corporation to erect. It was therefore an entirely new power, not given, because the power before imparted had departed from the corporation; but for a purpose, foreign from that, for which the power to condemn land had before been given. It was therefore a necessary power, for the purpose for which it was conferred, though the former power to acquire land by purchase or condemnation remained in full force; since under that former power, no lands could have been condemned *contiguous to canals already made*, for the purposes of mills or other water works; and it affords no inference that the former power, was considered as having ceased. But as it speaks of water rights thereafter to be acquired, it would seem to imply, that the right to make canals still existed, which was a means of acquiring water rights, and that, after the expiration of the time last limited by the acts of this State.

On the 29th of January, 1821, the legislature of *Virginia* passed an act authorising the appointment of commissioners, to ascertain among other things, whether the *terms and conditions* of the charter had been complied with; and if not, to advise and consult with commissioners to be appointed on the part of this State, as to the measures best to be recommended to, and conjointly adopted by the two States, either *for giving aid* to the company *in the further prosecution* of the work, or for the *institution of a prosecution*

against it, for the purpose of *annulling* and *vacating the charter*—and in the course of the same session, the legislature of *Maryland* passed a resolution for the appointment of commissioners to make the same joint inquiry ; substituting only, for the measure of instituting a prosecution, the alternative of adopting measures for the more effectual improvement of the navigation by some other means. Thus we have the sense of the States that granted the charter, clearly expressed by the concurrent acts of their respective legislatures, after the expiration of the last extension of the time limited by the 18th section, that if the *condition* (calling it and treating it as a *condition*, and not a *limitation*,) had not been complied with, not that the franchises had therefore expired, and that the corporation was dissolved, but that it continued to exist, in the possession of the corporate powers originally given to it, and that until it was dissolved by judicial action, it might, with sufficient pecuniary *aid*, go on to do the work originally authorised ; with the opinion of the legislature of *Virginia* plainly indicated, that the breach of the *condition* could only be taken advantage of by *direct* proceedings at law, instituted for that purpose, and the unwillingness of *Maryland* to adopt so harsh a measure.

And finally, the two States upon whose pleasure alone, the continuance of the corporation, and of its franchises depended, (both of them interested as stockholders, and *Maryland* largely as a creditor,) and which had a right to waive the breach, by any non-feasance or mal-feasance of any *implied* or *expressed* condition contained in the charter, having virtually waived the breach of the condition by the corporation in failing to exert its franchises, by the act to incorporate the *Canal Company* conclusively remitted to the *Potomac Company* any abuse, or neglect of its franchises, or any of them; and recognized and treated it as a subsisting corporation, in the full possession of all its original powers, in requiring its *assent* to the charter of the *Canal Company*, in

order to give it validity ; and by declaring in the 13th section of that charter, that upon the surrender and transfer by the *Potomac Company* to the *Canal Company* of its charter, *all the rights and powers thereby granted* to the *Potomac Company*, should be vested in the *Canal Company*, which included the right and power to condemn land for canals. Not the rights and powers, *then held* by the *Potomac Company*, but *all that had been granted*, and which must have been considered as *then subsisting*, otherwise they could not so pass and vest. Which shows the intention and meaning of the 18th section ; and it is not denied, (as it cannot be,) that in construing a statute, a subsequent law upon the same subject, may be resorted to, for the purpose of ascertaining the intention, which when discovered, must prevail ; all statutes in *pari materia* being construed as one law. But whether this view of the subject is correct or not, and independent of any corporate rights and privileges derived from the *Potomac Company*, a priority of right in the choice of a route for the canal in the valley of the *Potomac*, is claimed on the part of the *Canal Company*, by the force and effect of its own charter, viewed as a compact between the States of *Virginia* and *Maryland*, and the *Congress* of the *United States*, and between those sovereign parties and the *Potomac Company*. Which leads to an inquiry into the character and effect of that instrument.

A State may contract with an individual ; and it is equally certain, that two or more of the States, may enter into a compact or agreement *inter se* ; and the only question upon that subject is, whether that has been done in this case— which involves the further question, (if a question it can be at this day,) whether a State can contract by an act of its legislature. That it can so contract with an individual, is settled beyond all controversy by the decisions of the Supreme Court, in *Fletcher vs. Peck*, 6 Cranch. 87. *The State of New Jersey vs. Wilson*, 7 Cranch. 164. *Terrett vs. Taylor*, 9 Cranch. 43. *The Town of Pawlet vs. Clark and others*, 9 Cranch. 292 ; and *Dartmouth College vs.*

Woodward, 4 *Wheat*. 518; and that two or more of the States may contract in that form *inter se*, is settled by the same court in *Green vs. Biddle*, 8 *Wheat*. 1, which was the case of a law of *Virginia*, relating to the separation of the district of *Kentucky* from *Virginia*, and the erecting that district into a separate State, containing this clause, “that all private rights, and interests of lands within the said district, (*Kentucky*) derived from the laws of *Virginia* prior to such a separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State.” Which being afterwards ratified by a convention of the people of *Kentucky*, and made an article of the constitution of that State, it was held to be a compact between those States, the obligation of which, *Kentucky* could pass no law to impair. How then does this case stand? *Virginia*, impressed with the importance of that subject, but knowing that the object could not be accomplished by any act of its own legislature alone, nor by its sole authority, passed the act for the incorporation of the *Canal Company*, in January, 1824, requiring in terms, the assent of the legislature of *Maryland*, of the *Congress* of the *United States*, and of the *Potomac Company*, to its provisions, to give it effect and validity so far as concerns the eastern section of it, to which only, this suit relates. *Maryland*, treating it as a proposal offered for acceptance, assent, and confirmation, by an act of its legislature, passed on the 31st January, 1825, declared it to be “accepted, assented to, and confirmed.” The *Congress* of the *United States*, by the act of the 3d March, 1825, declared it to be “ratified and confirmed,” and on the 16th May, 1825, the *Potomac Company*, by a corporate act, signified and declared its “assent” to it, and to all its provisions.

There are no technical words necessary to constitute a compact, or contract, which are convertible terms; and neither need be used, and seldom is, in the instrument creating it. It is a mutual consent of the minds of the par-

ties concerned, respecting some property or right, that is the object of the stipulation, or something that is to be done or forborne; “a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised or stipulated by the other,” and any words manifesting that *congregatio mentium*, are sufficient to constitute a contract. Here we have the very language of contract, in the terms “accept,” and “assent to.” It is the language used by the parties to a compact of the most solemn and imposing character. The 7th article of the constitution of the *United States*, provides, that “the ratification of the conventions of *nine States*, shall be sufficient for the establishment of the constitution *between the States so ratifying the same*; and the language used by the conventions in their acts of ratification, is, “assent to and ratify,” “assent to, ratify, and adopt,” “agree to, ratify, and confirm,” “approve, assent to, ratify and confirm,” and the amendments proposed by *Congress* in 1789, were ratified by acts of the legislatures of the respective States, using the language, “ratify,” “assent to, and ratify,” “confirm and ratify,” “assent to, ratify, and confirm,” &c.

The constitution to which validity and effect, to which vitality was imparted, by those expressions of assent, became not a mere confederacy, or league, but a compact, in the language of the constitution, “*between the States so ratifying the same*,” as soon as it was so ratified by the number required by the 7th article; by which, they were reciprocally bound, that there should be such a government of the Union for the benefit of the whole, with the assent of the people, and proceeding from them, as that, provided by the constitution. And when the federal government was organized and brought into existence, which is a creature of the constitution, possessed of the rights and powers it confers, and subject to the duties it prescribes and enjoins, it became also a compact between the parties to it, and the federal government.

In this case, there were mutual interests in the subject matter of the reciprocal acts of the two States and of *Congress*, with an acknowledged authority to contract; and the legislature of neither of the States, could have performed by any separate act of legislation, what was proposed to be accomplished by the concurrent acts of all. One *terminus* of the canal is proposed to be in the *District of Columbia*, and the other in the State of *Maryland*; and *Virginia* could not of its own authority, by any separate act, authorise a canal to be made through *Maryland*, nor could *Maryland* authorise a canal to be made through *Virginia*, without its consent, nor could either or both of them, authorise one to be made in the *District of Columbia*, without the consent of *Congress*; *Maryland* and *Virginia* were interested in the *Potomac Company*; both, as stockholders, and *Maryland* largely as creditor, and both of them, and also the *United States* were interested in the river, and the works erected by the *Potomac Company*, as a public highway. Neither of the States therefore, without the consent of the other, nor both of them without the consent of *Congress*, could have repealed the charter of that company, nor have received, or authorised the surrender of it, and of the works, to another company. Neither State could have authorised the condemnation of land, nor the imposition and collection of tolls within the territory of the other, without the consent of that other; nor could either or both of them, have authorised either to be done within the *District of Columbia* without the consent of *Congress*. The 14th section, declares “that the said canal, and the works to be erected thereon in virtue of this act, when completed, shall forever thereafter be esteemed and taken to be navigable as a public highway.” Not, that the part in *Virginia*, shall be a highway there, nor the part in *Maryland*, a highway in *Maryland*; but the entire canal shall be one continued connected highway, through the respective territories of the three sovereigns; and neither of the two States could have made a public highway through the territory of the other, without the consent

of the other ; nor neither or both of them, through the *District of Columbia*, without the consent of *Congress*. Yet all this, wearing the features of a conventional arrangement, has been done by the reciprocal and concurrent acts of the three sovereigns ; with other stipulations and reservations of rights, impressing upon those acts the qualities of a compact.

The 9th section declares, that the canal and other works “shall be forever exempt from the payment of any tax, imposition, or assessment whatsoever.” Now ordinarily, *Congress* and each State has a right to impose taxes within its own jurisdiction, and neither has the power to deny it to the other. What then, is that renunciation of the right to impose taxes, but a stipulation or agreement between them, that neither will exercise that right ? And the 14th section provides, that no other toll or tax for the use of the canal and works, except those authorised by that act, “shall at any time be imposed, but by consent of the said States, and of the *United States*.” Is not that an agreement or stipulation, that neither will authorise the imposition of any further toll or tax, even within its own territory for the use of the canal, without the consent of the others ? There is a stipulation in the first section, that *Congress* and each of the States shall appoint commissioners for taking subscriptions to the stock, and carrying the act into operation. Not to act separately, as if it were a separate law of *Congress*, and of each of the States ; but to act conjointly for carrying it into effect, as the united act of all—and the stipulation for the appointment of commissioners, could only have been an agreement between themselves, as the corporation was not then in existence, and was only to be brought into existence by the agency of their joint commissioners, as a creature of their joint creation. In the 20th section, there is a provision for reserving to each State, the right to charter another company, in case the western section of the canal, should not be completed within the time limited. And in the 21st section, there is a reservation to each of the States, of the

right to make lateral canals, to be fed by the waters of the *Potomac*; and to the government of the *United States*, to extend the principal canal through the *District of Columbia*, with a provision that before the act should take effect, *Congress* should authorise the two States, or either of them, to take and continue a canal from any point of the principal canal, through the *District of Columbia*, &c. (which was done by *Congress* in the act of March, 1825, and the unnecessary explanatory section of the act of 23d May, 1828.) There is also in the 21st section the further provision, "that in taking or extending such lateral canal or canals through the *District of Columbia*, by either of the States, no impediment or injury be done to the navigation of the *Chesapeake and Ohio Canal*." And are not those reservations and provisions, mutual stipulations or agreements, that each shall have and enjoy the rights and powers reserved and conceded, and that neither of the States, shall make any lateral canal or canals to the prejudice of the navigation of the principal canal? We have moreover the understanding of the parties themselves, of the character of this act of incorporation.

The 1st section of the act of December session, 1826, which is an act for the amendment of the act of incorporation, after reciting, that it had received the assent of *Maryland*, *Congress*, and the *Potomac Company*, declares that it shall be amended, &c. "on condition that this act receive *in like manner*, the assent of the necessary parties thereto." And the 4th section, "that this act shall commence and be in force, as soon as it shall have received the assent of the legislature of *Virginia*, of the *Congress* of the *United States*, and of the *Potomac Company*," showing them to be the parties alluded to as the necessary parties. It did receive their assent, and became a part of the charter. It does not in terms call that act, or the original act, a contract, but it uses equivalent expressions, "*receive in like manner, the assent of the necessary parties*;" parties to what? not to that act, as a separate, and independent act of

the legislature of *Maryland*: that could not be; neither of them could be a party to it, as a mere law of *Maryland*. It was only in the character of a compact, that they could become *parties to it*; and being parties to the original charter, which that act proposed to amend, they were necessary parties to that act, and the assent to that act, by all the parties named, was a recognition of the necessity for their concurrence as parties to it; in order to give it the effect to alter, or in any manner modify the original act—and the same may be said of the act of the December session, 1827.

There were mutual interests, advantages, and rights, reciprocally conceded and compensated, by the concurrent acts of *Virginia*, *Maryland*, and *Congress*, constituting the original charter, which by any fair test that can be applied, is believed to be a compact between the two States and *Congress*, a reciprocal pledge of public faith, that there should be a corporation, the creature of that compact; created, not merely for its own benefit and advantage, but to effect a great national object, in which all were concerned, for the common benefit and advantage of all, and for the public good; and that whenever the corporation should be brought into existence, it should be invested with all the privileges, rights and powers, provided by the charter, for the accomplishment of the end contemplated, without any diminution or alteration of the franchises as therein expressed. There is no acknowledged necessity, for any stronger, or more technical terms, to constitute a compact between two or more states, than between a state and an individual; and the terms here used, would be quite sufficient to constitute a contract between a state and an individual. Indeed this very charter being a grant, is an implied contract with the corporation, not to re-assert the rights it has granted.

It has been intimated, rather than seriously argued, that under the provision of the constitution, "that no state shall, without the consent of *Congress*, enter into any agreement or compact with any other state," this charter is inoperative

as a compact between the two states, for want of the constitutional assent of *Congress*.

The assent of *Congress* to the provisions of the charter, is required by the 23d section, to be given "as the legislature of the *District of Columbia*." The consent of *Congress* could not have been given as the legislature of the *District of Columbia*. It has no capacity to act as the local legislature of that, or any other particular district, and can only act in the capacity of the legislature of the Union, (in which capacity its assent was given to this charter,) and no state, after having entered into a solemn agreement with another, is competent to renounce the constitutional assent of *Congress* to it, as the legislature of the Union.

There is no particular form, in which the assent of *Congress* is required to be given, and it is not material in what form it is given, provided it is done. Here is an act, proposing to create a corporation, with all the necessary rights and faculties for making a canal, to terminate in the *District of Columbia*, to which the assent of *Congress*, a party in interest is required to give it validity, and *Congress ratifies and confirms* it, so far as may be necessary, for enabling any company *formed by the authority of that act of incorporation*, to carry into effect its provisions, in the *District of Columbia*; and is not an assent to the provisions of the act being carried into effect in the *District of Columbia*, *by a company to be formed under the authority* of the act, an acknowledgment of its authority, an assent to the act itself, and to the creation of a company, with all the powers proposed to be given to that company, for executing its provisions? The act does not provide for the making a separate canal in the *District of Columbia*, nor did *Congress* intend so to restrict the company; but to authorise an *extension* into the district of the canal indicated by the provisions of the act, and by the means the act prescribes; and the assent to the *extension* of the canal into the district, was a recognition of, and an assent to the whole scheme of the canal itself, and of the provisions for making it. And thus *Con-*

gress, by the very act of becoming a party to the whole scheme of the canal, in acceding to it, to the extent of its territorial interest, gave to the compact or agreement, such an assent as was sufficient to gratify the constitution. But it is unnecessary to dwell longer on this part of the case. In *Green vs. Biddle* it was decided, that no particular form, for the assent of *Congress* to a compact between states, was required, and it was held that the consent of *Congress* in terms, “to the erecting the district of *Kentucky* into a separate and independent state, and its reception into the Union,” upon a certain day, was a sufficient consent under the constitution, to the compact in detail between *Virginia* and *Kentucky*, for that purpose; though no part of the compact, except that which related to the erection of *Kentucky* into a separate state, was adverted to in the act giving the consent of *Congress*; and the act of *Congress* of 23d May, 1828, assenting to the acts of this State, for changing the route of canal above *Cumberland*, and substituting rail ways, &c. for a canal through the *Alleghany* mountains, declares “that the assent *already given* by the *United States* to the charter of the *Chesapeake and Ohio Canal Company*, shall not be impaired by any such change, &c.” which plainly shows that *Congress* understood the assent before given, to extend to the whole charter a compact, and all its provisions—otherwise, the provision that a change in the route of the canal above *Cumberland*, should not impair that assent, would have been unnecessary, as no change of the route above *Cumberland*, could in any way affect that assent, unless it extended to that part of the route. Besides, it speaks of the assent before given to the *charter*, in terms which embraces all its provisions.

The *Potomac Company*, which was also the creature of a compact between this State and the State of *Virginia*, was at the time the original act was passed for incorporating the *Canal Company*, a subsisting corporation, and its charter could not have been repealed or annulled, nor any of its corporate rights diminished or infringed, without its con-

currence. Its assent therefore, to the scheme of a new corporation in its place being necessary, it was expressly made a condition precedent to the consummation of the canal charter, and to the vesting of any rights under it; to be signified by its corporate act registered among the archives of the two States, and of the *United States*, which was regularly done.

Upon its assent so given in consideration of a stipulated equivalent, the canal charter was to take effect, and not otherwise. It was not to be evidenced, as has been supposed, by a surrender of its charter, and transfer of its property and rights to the *Canal Company*; which was only authorised to be done by the 13th section, after its *assent* had been declared, as required by the 1st section, and after the *Canal Company* had been formed; and could not have been done before the company was formed, and in a condition to receive such surrender—and it was only after the *assent* that the company could be formed, as without it, there would have been no authority for its formation, no act of incorporation.

What the *Potomac Company* was required to yield, was its charter, with all its rights and property held under it—and the proposed equivalent, was the benefit to that company, of the privilege of stock in another company, possessed of all the rights and advantages proposed to be granted to the *Canal Company*, being paid for in the debts of the *Potomac Company*, and in certificates of its stock at the par or nominal value.

It was plainly a proposal made to the *Potomac Company*, for its acceptance, in the form of legislative enactments, to this effect; if you will consent to the provisions of this act, for incorporating the *Chesapeake and Ohio Canal Company* in your place, you shall, on the formation of that company, be authorised to surrender and transfer to it, your charter, with all your corporate rights and privileges; as an equivalent for which, and in consideration of your assent, the *Chesapeake and Ohio Canal Company* shall be invested

with all the rights and privileges that the provisions of the act impart, and subscriptions for stock in that company shall be payable in claims against you, and in certificates of your stock at par ; such a transaction between individuals, in relation to any matter about which they were competent to contract, would clearly be a contract, the obligation of which the State could pass no law to impair. And it is conceded that, that legislative proposal, agreed to by the solemn corporate act of the *Potomac Company*, amounted to a contract between the two States and *Congress* on one side, and the *Potomac Company* on the other, to the same extent, and of the same obligatory force and effect, as the compact of *Congress* and the two States *inter se*. Not awaiting the formation of the *Canal Company*, nor the surrender and transfer to it by the *Potomac Company*, of its charter and property ; but *eo instanti* that the assent of the *Potomac Company* was given, it became a compact, and by virtue and force of that very compact, a law ; the concurrence of the parties to the compact being a condition precedent to its becoming a law, which compact and law, it was not competent to the *Potomac Company* afterwards to defeat or annul, nor by any act to rescind its assent.

And it is a mistake to suppose, that its becoming a compact, depended upon the coming into existence of the *Canal Company*, and its acceptance of the offered terms as a necessary party. The coming into existence of the *Canal Company*, depended upon the prior formation of the compact, of which it was to be the creature, and without which it could have had no existence. When the *Canal Company* did come into existence, and accept the charter, in the only way it could, by the very act of coming into existence, the subscriptions to the stock, the charter became a grant, from which, there then resulted a contract between the two States and *Congress*, and the *Canal Company*; but distinct from the compacts of the two States and *Congress inter se*, and between them and the *Potomac Company*. They were contracts, that there should

be such a corporation, with all the rights and privileges provided by the charter. The contract of the two States and *Congress* with the *Canal Company* is, that they will not re-assert the rights they have granted.

Upon the faith of the canal charter, the *Potomac Company* surrendered and transferred its charter, and all the rights and property it enjoyed and held under it, in consideration of a stipulated equivalent; the value of which depends upon the inviolate conservation of the chartered rights of the *Canal Company*. For of what value would the privilege of paying for stock of the *Canal Company*, in the debts, and certificates of stock of the *Potomac Company* be, if the stock of the *Canal Company* should be made worthless by an act of the legislature? and would not the faith of the States be violated by impairing that equivalent in any way, without the consent of the *Potomac Company*?

But if there is any ambiguity in the original act for incorporating the *Canal Company*, or doubt arising upon that act alone, as to the intention of the respective legislatures, the understanding of *Congress*, and of the two States, that it was a compact, to which they and the *Potomac Company* were parties, and could not therefore be in any manner altered or modified, without the consent of that company as a *necessary party* to such alteration; and that they acted upon that understanding, is demonstrated by the act of this State, of the December session, 1826, assented to by *Virginia* and by *Congress*, for amending the charter; which requires as a condition precedent to its becoming a law, that it shall receive the assent of *Virginia*, *Congress*, and the *Potomac Company*, as *necessary parties* thereto, *in like manner as they had assented* to the original act—and also by the act of the December session, 1827, for further amending the charter, which required and received the same assent. And these acts are particularly worthy of notice, as showing the presence of a contract to which the *Potomac Company* was a party in interest; since, if it had no interest in the conservation of the canal charter, and of the rights

and privileges it professes to confer, there was no necessity for requiring its assent to any change in the route of the canal. But the recital in the preamble, that "it is represented to this general assembly, that the *Potomac Company* are willing and desirous that a charter shall be granted to a new company, upon the terms and conditions hereinafter expressed, and that the charter of the present company shall cease and determine," furnishes evidence of a conventional arrangement with that company, and would seem to be conclusive of the question of contract.

As to the sphere of the operations of the proposed corporation, looking to the various documents accompanying the answer, there would be no difficulty in ascertaining through what region it was intended the canal should pass; but it is unnecessary to resort to those documents generally, or to inquire how far recourse may be had to them for that, or any other purpose; the charter itself sufficiently and clearly designates the valley of the *Potomac* for the intended route of the canal.

The preamble states the object to be the construction of "a navigable canal from the tide water of the river *Potomac*, in the *District of Columbia*, to the mouth of *Savage Creek*," &c. "to be *fed through its course* on the east side of the mountain, by the river *Potomac* and the streams which empty therein." Here then, is a canal to begin, and end upon the river, and to be *fed throughout its course*, by the *waters of the river*, from one *terminus* to the other. Could there have been a clearer manifestation of the intention of the makers, that the canal should pursue the course of the river? The right to make a canal, necessarily drawing to it, (if there was nothing more to indicate the valley as the intended route,) the right to make it where it could be supplied with the water, the vital stream by which it was intended to be fed.

The two *termini* being thus fixed, the laws of nature point to the course of the river, as the route of the canal.—The recital too in the preamble, that the *Potomac Company*

were willing and desirous that a charter should be granted to a *new company*, upon the *terms and conditions* thereafter expressed, shows it was intended as a substitution of the *Canal Company* for the *Potomac Company*, and to take its place in all things, and it has been seen, that the operations of the *Potomac Company* were confined to the valley of the *Potomac*.

The enacting clauses are in perfect accordance with the preamble, and provide for carrying it into effect. The 4th section authorises and empowers the corporation to cut canals, erect dams, open feeders, construct locks, and perform such other works, as it shall judge necessary or expedient for completing the canal *before mentioned and described*; that is, the canal described in the preamble, to be made from tide water to the mouth of *Savage Creek*, and fed by the *Potomac*.

The 15th section, after reciting that, "it is necessary for the making of *the said canal*, &c. that a provision should be made for condemning a quantity of land for the purpose," authorises the acquisition by condemnation, of *any land through which the said canal is intended to pass*, (still referring to the canal described in the preamble,) and declares, that on the payment of the valuation of the land so condemned, the title shall vest in the corporation; and the 19th section authorises the corporation, during the pendency of any proceedings, to subject any land to the purposes of the act, to enter upon the land and go on with the work. The 20th section declares, "that the *eastern* section of the canal shall begin at the *District of Columbia* on tide water, and terminate at or near the bank of *Savage* river or creek, which enters into the north branch of the *Potomac*, at the base of the *Alleghany* mountains," and the 13th provides, for the establishing a rate of tolls, on the different parts of the canal, as they shall be finished, "until the eastern section shall be finished, up to the mouth of *Savage* river or creek." The 11th directs the appropriation of the surplus tolls, "to the accommodation of the inhabitants of the shores

of the river *Potomac*, by affording to them, in the best practicable mode, a safe and easy access to the canal, from the surface of the main river.” Now, how are the inhabitants of the shores of the river to be accommodated with a safe and easy access to the canal from the surface of the river, unless the canal is constructed upon the shore, or in the valley of the river? The 13th section makes it the duty of the corporation, when any part of the canal shall not be finished, “to keep the *corresponding part* of the river in a proper state for navigation.” What *corresponding part* of the river can there be, if the canal is not made along the river? And the same section annuls the charter of the *Potomac Company*, upon its surrender and transfer to the *Canal Company*, and grants to the *Canal Company* all the rights and powers, that had been granted to the *Potomac Company*; which included the original power of the *Potomac Company* to make canals along the borders of the river. The 2d section of the act of December session, 1826, for amending the charter, assented to by *Congress, Virginia*, and the *Potomac Company*, authorises the termination of the *eastern* section of the canal, “at or near the town of *Cumberland* on the river *Potomac*,” (which is situated on the *Maryland* side of the river,) instead of the mouth of *Savage* creek and the commencement of the *western* section at that point, and has also this provision, “and in the event, that the *western* section of the *Chesapeake and Ohio Canal* shall leave the valley of the *Potomac* river, at any point below the coal banks, at or near the mouth of *Savage*, &c.” showing the intention of all the parties, that the route of the *eastern* section of the canal should be in the valley of the *Potomac*, and designating the town of *Cumberland* as a point in the valley of the *Potomac*, on the left or *Maryland* shore of the river to which it should go. The board of engineers for internal improvement, acting under the authority of the general government, in their report, made before either *Congress* or the *Potomac Company* had assented to the act of incorporation, explicitly state, that the

eastern section of the canal must pass through the valley of the *Potomac*, and follow the course of the river without any deviation, and that the side on which it should go, is the only choice left, but giving a preference to the left or *Maryland* side—and they base their estimate of the cost upon a construction of it on the *Maryland* shore—which survey and report were recognized and adopted, as designating the route of the canal, by the legislature of *Maryland*, in the act of the 6th March, 1826, for the promotion of internal improvement, in the proviso to the subscription to the stock of the *Canal Company*, that the executive should be satisfied that the residue of the sum estimated by the *United States'* board of engineers to be adequate to the completion of the *eastern* section of the canal, had been subscribed by *bona fide* and competent subscribers; which act also provides for a canal to be made by the *Maryland Canal Company*, “from some convenient point on the *Potomac* river, *continuing* the *Chesapeake and Ohio Canal* to the city of *Baltimore*”—and the assent of *Congress* and of the *Potomac Company* having been given to the original charter, after that survey and report were made, they may be considered as having received their sanction also—and the survey and estimate of the cost of the same route, by the civil engineers, *Geddes* and *Roberts*, may likewise be considered as the basis of the subscription by *Congress*, of a million of dollars (which was made afterwards,) to the stock of the *Canal Company*.

With all this before us, is it not perfectly manifest, can it for a moment be doubted, that the valley of the *Potomac* was intended, and specifically designated for the route of the contemplated canal? If indeed the sanction given by this State to the proceedings of the board of engineers for internal improvement, by making their survey the basis of a subscription of half a million of dollars, to the stock of the *Canal Company*; and the assent of *Congress*, and of the *Potomac Company* to the original act, after that survey had been made; and the subscription by *Congress* of a mil-

lion of dollars, consequent upon the survey, and estimate of cost of the same route by the civil engineers, *Geddes* and *Roberts* appointed for that purpose, may not be taken as an actual appropriation of the land surveyed for the route and site of the canal. If the *Canal Company* had come into existence immediately, and before the rail road charter was granted, it would have taken a *vested right* to choose a route for the site of the canal, in the valley of the *Potomac*, along either bank of the river, except at the upper *terminus*, which, whether at the mouth of *Savage* creek according to the original charter, or at *Cumberland* according to the amendatory act of the December session, 1826, is confined to the *Maryland* shore, both of those places being on that shore, and specifically designated for the upper termination of the *eastern* section of the canal, a right created by the charter, and existing independent of any survey, or act of location or of condemnation, which would be but an exertion of that right. And if the *Rail Road Company* had afterwards been chartered and organized, before any exercise of that vested right by the *Canal Company*, it could not, by any act of location or appropriation, have defeated or overreached it. The prior grant that gave, would have preserved the prior right. It would have been a corporate right, a vested franchise, to select the most suitable ground for the construction of the canal within the assigned sphere of action, which neither of the sovereign grantors alone, nor all together, could by any direct legislative act, have taken away or repealed; and much less could it be taken away, or disturbed by the act of any other corporation. This franchise, this corporate right, to select and acquire land for the authorised purposes of a corporation, is property; it is an incorporeal hereditament, not a legal title to the land itself, not a *mere capacity* or *faculty* to acquire and hold land, such as every individual possesses; but in addition to such capacity, it is a right or privilege, a portion of the eminent domain vested in the corporation, to acquire the legal title to land subjected by the grant to its will, and

thus to convert the incorporeal into a corporeal hereditament, and after the franchise to choose and condemn land for any particular public purpose, that portion of the eminent domain granted and subsisting in one corporation, cannot be bestowed upon another, to the prejudice of the former grant; nor can any other legally acquire, any such right of way or title to the land over which the franchise extends, as will hinder the former corporation in the exercise and enjoyment of its franchise. And although the *Canal Company* was not actually incorporated, and had not accepted the charter, before the *Rail Road Company* was chartered and organized, yet it is entitled to all the rights, benefits, and liberties, with which it would have been invested, if it had been organized before any antagonist corporation came into existence. It is not like the common case of an act of incorporation, passed by an individual State, which ordinarily, the State may repeal or modify at pleasure, at any time before it is accepted, and when no rights are acquired under it, and if it is accepted after any alterations are made, the corporation takes it subject to such modification; because, until accepted, it is not a grant, and there is no contract between the State and the corporation, no pledge of public faith, to be violated by any alteration of the charter. And is it not on the ground of an original contract with the *Canal Company*, by *Congress* and the two States, at the date of this charter, that on this point of the case, the corporation is considered as having taken the charter, and holding it according to the then state of things with all its provisions inviolate; for it is admitted, that the three sovereign grantors, with the consent of the *Potomac Company*, might have repealed, or modified the charter, (as they did in more instances than one,) or have granted the same franchises to any other company, at any time before acceptance by the *Canal Company*, or any act done, or right acquired under it; as until then, it had not assumed the character of a contract with that company, and therefore might have been altered or annulled by the united action of the parties, from

whose concurrence it derived its existence. Though neither, acting alone and independently of the others, had the ability to do it, according to their own understanding of its charter and obligations; as is conclusively shown by the several amendatory acts of this State, of the December sessions 1826 and 1827, expressly requiring, and receiving the concurrence of all, in order to give them validity; and the former in terms styling them *necessary parties*. But it is on the ground of the compact and agreement of *Congress* and the two States *inter se*, and between them and the *Potomac Company*, arising from the reciprocal and concurrent acts of the three former, and the assent of the latter; the consummation of which, was on the 16th May, 1825, the day on which the assent of the *Potomac Company* was given, anterior to the date of the rail road charter; and under the protection of the constitution of the *United States*, cannot be impaired or affected by any thing contained in that charter.

It is conclusively settled by the Supreme Court of the *United States*, in *Fletcher vs. Peck*, *Terrett vs. Taylor*, *The Town of Pawlett vs. Clark*, *Dartmouth College vs. Woodward*, and in *Green vs. Biddle*, that contracts between States and individuals, and also contracts between two or more States, are within the protection of the provision of the constitution, “that no State shall pass any law impairing the obligation of contracts,” and that no State can constitutionally pass any law, impairing the obligation of its own contract, whether with an individual, or with another State. The contract here was, that there should be a corporation, which, whenever it should be organized, should, by virtue of the charter, have the right to make a canal from the tide water of the river *Potomac*, in the *District of Columbia*, through the valley, and pursuing the course of the river, to the mouth of *Savage* creek, (a point on the left or *Maryland* side of the *Potomac*,) with permission afterwards given, to stop at the town of *Cumberland*, upon the river, (also a point designated on the *Maryland* side,) with

power to acquire by purchase or condemnation, any land that should be found necessary for that purpose; which of necessity included the right to choose the route of the canal within the designated region, as the mere right to condemn land would have been of no value, and the canal could never have been made, without the additional right to select such land for condemnation, as should be thought best suited to the purpose; no specific part of the valley being appropriated. That right of choice then, in addition to the right to condemn, which is dependent upon the exercise of the right to choose, is a franchise, a portion of the eminent domain, which the sovereign grantors contracted should vest in the *Canal Company*, whenever it should be formed. It was a right residing in those sovereigns respectively, distinct from the exercise of it, which they had the power to exercise themselves, or to contract for the exercise of, by a company to come into future existence, and that, they did; not that the company should, on being incorporated, have the legal title to any lands held by individuals, but the franchise only to choose the route of the canal, and to acquire by purchase or condemnation, the legal title to the land selected for its site. It was to have also, all the rights and privileges that had been granted to the *Potomac Company*. That contract has not been rescinded; was in full force at the time the rail road charter was granted, and has been constantly recognized, by all the contracting parties, and the charter treated as subsisting in all its integrity, capable only of being altered, by the consent of all the parties, even for the purpose of enlarging the authority of the company. By *Maryland*, in its various acts, both before and after the date of the rail road charter, relative to large subscriptions to the stock, and authorising the intersection of it by other similar works, according to its provisions; by *Congress*, in subscribing to its stock; and by all the parties in the amendatory acts of 1826, and 1827, the 3d section of the first of which, (passed at the same session that the rail road char-

ter was passed,) provides, that nothing in that act shall discharge the company from a compliance with each and every of the conditions of the original act, except as therein altered. The contract is, that the canal company shall take and hold the charter, with all its provisions, all the rights and privileges it professes to impart. The right to make the canal in the valley of the *Potomac*, is not more distinctly stipulated, than the right to choose or select the route of the canal within that valley: and one stipulation can no more be violated, than the other. To exclude the canal from the valley of the *Potomac* altogether, would be no more a violation of the contract, than to obstruct or restrict the exercise of the right, to choose the most eligible ground for the construction of it. The right to choose the route, is not restricted by the contract, to either side of the river, except at the points designated for the termination of the eastern section; but is submitted to the judgment of the company, as it should have been. It is, by the contract, to have a choice between the two shores; authorise another company to occupy one of the shores, and that choice, that alternative is gone; it must take the other or none; and the contract, that it should have the right of choice, is violated. Besides, if *Maryland* has a right to authorise the occupation of the shore on the *Maryland* side of the river by another company, *Virginia* has the same right, and between them, though only two of the contracting parties, the power to make the canal at all, might be destroyed, and the charter virtually annulled. Let it be pronounced that the *Rail Road Company* has the right to take possession of the *Maryland* side of the river, and what is there to prevent it from the taking like possession of the *Virginia* shore, wherever it may be found convenient? In which event the charter of the *Canal Company* would become as blank paper; for if it would have the right to go out of the valley with the canal, it would want the physical power, the proof being in the language of one of the witnesses, (an engineer,) that to make it out of the valley, would be a canal impracticability—and the

further proof is, that if the claim of the *Rail Road Company* should be established, the canal could only be made on the *Maryland* shore, with such difficulty, and at such an expense, that no practical engineer would recommend it. In which case, the canal, if it went on at all, would have to cross the river, where it might be met by the same, or another company; for if to infringe the right of choice in this State, would not be to impair the obligation of the contract by the sovereign contractors *inter se*, neither would a similar infringement in *Virginia*, impair the obligation of the contract between the grantors and the *Canal Company*. The same law equally applies to both contracts. But if it were otherwise, the fact that both companies have chosen the same shore, and the same route, is sufficient to show that, that is the best route; and the occupation of it by the *Rail Road Company*, even if there should be another, would equally impair the obligation of the contract, since it would obstruct the exercise of the right of choice; and the nature or degree of the hindrance, the extent to which the obligation of a contract is impaired, be it great or small, is not material in the view of the constitution. If therefore, under the proper construction of the rail road charter, or the practical application of it, that company would be enabled so to locate and construct the road, as to interfere with, and restrict the action of the *Canal Company* in the choice of the route of the canal in the valley of the *Potomac*, or in the exercise of any of the rights and privileges granted to the *Potomac Company*, in so far, it is contrary to the constitution of the *United States* and void; and no rights to land, or of way, acquired by the *Rail Road Company*, can be set up against the paramount rights and privileges of the *Canal Company*, which stand as if the rail road charter had not been granted. The analogy insisted on in argument between this, and the case of two general or common land warrants, is not admitted; as between the holders of general warrants, there is no priority of right to locate. The warrant is in truth, nothing more than a mere authority to

the surveyor or proper officer, to make the survey, and the certificate is the inception of title, to which the patent when issued, relates. The State may issue as many general land warrants as it pleases; the issuing of one, does not preclude its issuing another or more; and he who can get his warrant first executed, though the *junior* warrant secures the land, notwithstanding all may be laid upon the same land, because the warrant confers no right, and it is from the act of location alone, that the right arises, and the title to the land remaining in the State, may, until the warrant is located, be granted to any other. But not so with an act of incorporation, which when accepted, amounts to a grant, and the right conferred, a vested franchise, existing independent of any act of location or survey, which the State cannot re-assert, nor grant to any other; it is therefore a prior right, to which all subsequent grants must yield. Here there was a consummated contract or pledge of public faith, anterior to the rail road charter, against the effect and operation of which, it is protected by the constitution of the *United States*, and to the prior right of choice so secured by that contract or pledge, the rail road charter must give place. If there is any analogy, it is to a special land warrant, arising from the peculiar and special designation of the valley of the *Potomac*, for the route of the canal.

If there was any thing unwise, in not having limited a time for the formation of the *Canal Company* under the charter, that was a question for the sovereign grantors themselves, and cannot affect the rights of those claiming under it. But there is no want of wisdom perceived: it was a subject of great difficulty, and some doubt as to the practicability of the scheme; one company had already been in operation more than forty years, without being able to effect the desired object, and it could not well have been supposed, that others would embark their funds in such an enterprise, very hastily, and without having first taken proper measures to ascertain the probable cost of accomplishing it, if upon examination it was found to be practicable—and if

there had been any unreasonable delay in forming the company, (as there was not,) they who made the charter could easily have revoked it, before any rights were acquired; and if, after being formed, it had lain by, and suffered the rail road to be made, without interposing any claim to the route on which the road was constructed, such acquiescence would have amounted to a waiver of its rights, which it would not afterwards be permitted to resume, to the destruction of the road. No argument therefore can be drawn *ab inconvenienti*, against the right claimed by the *Canal Company*.

To the objection rather suggested than urged, that the *Canal Company* was not a party to the contract between the two States and Congress, it is enough to say, that it is the creature of that compact; was brought into existence by it, and claims, and holds all its rights under it; as well those which had been granted to the *Potomac Company*, (in place of which it is substituted,) as others more extended; the whole of which depend upon the inviolate conservation of that compact or pledge of public faith. In *Green vs. Biddle*, 8 Wheat. 1, the suit was not between parties to the compact. The compact was between the States of *Virginia* and *Kentucky*; and the suit was between individuals, one party claiming under a law of *Kentucky*, and the other setting up the compact, to show the law to be unconstitutional and void, and succeeded in doing so. But if the canal charter could be treated as the separate and independent act of *Maryland* alone, and which the legislature had therefore the power to repeal at any time before it was accepted, or any rights acquired under it; should the rail road charter be so construed, as to deny to the *Canal Company* the prior right to choose a route for the canal in the valley of the *Potomac*, and to give to the *Rail Road Company* the right asserted in the bill, to construct the road in the same valley, before the *Canal Company* shall have selected the route of the canal?

Statutes should be construed with a view to the original intent and meaning of the makers, and such construction should be put upon them, as best to answer that intention, which may be collected from the cause or necessity of making the act, or from foreign circumstances; and when discovered, ought to be followed, although such construction may seem to be contrary to the letter of the statute.—*Plow.* 205, 232. *11th Coke Rep.* 73. *19th Vin. Abr.* 519. *6th Bac. Abr.* 384. That, therefore, which is within the letter of a statute, is sometimes not within the statute, not being within the intention of the makers. “If laws and statutes seem contrary to one another, yet if by interpretation they may stand together, they shall stand;” and where two laws only so far disagree, or differ, as that by any other construction they may both stand together, the rule that *Leges posteriores, priores contrarias abrogant*, does not apply, and the latter is no repeal of the former. *Roll. Rep.* 90, 91. *2d Co. Rep.* 5, 6. *11th Coke Rep.* 63, 64. *19th Vin. Abr.* 519, 525. It is laid down as an established rule, in *19 Vin. Abr.* 525 Pl. 132, that “repeals by implication are things disfavored by law, and never allowed of, but when the inconsistency and repugnancy are plain and unavoidable; for these repeals carry along with them, a tacit reflection upon the legislators, that they should ignorantly, and without knowing it, make one act repugnant to and inconsistent with another; and such repeals have ever been interpreted, so as to repeal as little of the preceding law as is possible;” and in *6th Bac. Abr.* 385, 385, that “where it is manifestly the intention of the legislature, that a subsequent act of parliament shall not control the provisions of a former act, the subsequent act shall not have such operation, even though the words of it taken strictly and grammatically, would repeal the former act.” These principles have been recognized and adopted by courts, from the time of *Roll*, *Plowden*, and *Coke*, to the present day. In *Williams vs. Pritchard*, *4th Term Rep.* 2, where the question was, whether a house built on land

recovered from the river *Thames*, which by the *Statute 7th, Geo. 3*, was exempted “from all taxes and assessments whatever,” was liable to be assessed to the general land tax, imposed by the *27 Geo. 3*. *Lord Kenyon* in delivering the opinion of the court of *King’s Bench*, said it could not be contended, that a subsequent act of parliament would not control the provisions of a prior statute, if it were intended to have that operation. But decided in that case, that though the words of the general land tax act of the *27th Geo. 3*, were sufficiently large to subject the land to the payment of the tax in question, yet that the statute of *7th Geo. 3*, exempting it from taxes, was not thereby repealed, on the ground, that it was not considered to have been the intention of the legislature to repeal it.

In *Preston vs. Browden*, 1 *Wheat.* 115. The Supreme Court of the *United States*, in construing an act of assembly of *North Carolina*, had recourse to the history and situation of the State, and treaties made by that State with the *Indians*, in order to ascertain the intention of the legislature, and thereby to arrive at the meaning of the act, and decided, that it did not embrace the land in question, though the words of it were sufficiently broad and extensive; on the ground, that it did not appear to have been the intention of the legislature; and in *McCartee vs. the Orphan Asylum Society*, 9th *Cowen*, 437, it was decided, that although the word *purchase* comprehends the acquisition of an estate, as well by *devise*, as by the *party’s own act*, yet that the act of the legislature of *New York*, incorporating the *Orphans’ Asylum Society*, which enacts that, that institution, “shall be capable in law of purchasing, holding and conveying any estate, real or personal, for the use of the said corporation,” did not so far operate as a repeal of the statute of wills, of that State, which prohibits a *devise* of real estate to bodies *politic and corporate*. Thus limiting and restricting by construction, the acknowledged legal import of the term *purchase*, and confining it to such other modes of acquiring real estates, as do not include a *devise*, on the ground,

that it was only the intention of the legislature, to grant to that corporation the right to *purchase*, subject to other existing statutes, and not to confer a right to purchase without restraint, and therefore, that the term *purchase*, ought not to be construed in its most comprehensive sense, since by doing so, it would have the effect to repeal the express words of a prior statute; but in a more restricted sense, so as to leave the former act unimpaired, and that both might stand together. Keeping in view the principles before stated, and upon which the decisions referred to were made, with many others quite as strong that might be mentioned, let us for a moment examine, whether it was the intention of the legislature of *Maryland*, when granting the rail road charter, in any manner to limit or restrict the provisions of the act to incorporate the *Canal Company*, or to alter or abridge any of the rights or powers originally intended to be given by that act, or to repeal any part of it; and if not, whether the rail road charter must be so construed as to operate that effect. It has been seen, that the valley of the *Potomac* is specially and clearly designated by the charter, for the route of the canal from one *terminus* to the other, the upper *terminus* being required to be at a point on the *Maryland* shore of the river; and that it was considered as a work of great national, as well as local importance. And it is undeniable, that independent of any interference by the rail road charter, the *Canal Company* would be entitled to select a route for the canal, in that designated region. On the other hand, the rail road charter is general and affirmative in its terms, with no route prescribed, no particular region or district of country designated for the location of the road, nor any thing relative in its character, requiring it to be constructed, (as in the case of the canal,) in the valley of the *Potomac*. A general power only being given to the company to *enter upon, use, and excavate, and to acquire by purchase or condemnation, any land which may be wanted for the site and construction of the road*. There is no reference to the canal charter,

(which is not mentioned) nor to any of its provisions, or the particular region within which the canal is required to pass, and must be made, if at all; but upon the face of it, it is perfectly compatible with the canal charter, and it is only by the practical application of it, under the construction contended for, that any interference is produced.

On the 16th of May, 1825, the day on which the *Potomac Company* gave its assent to it, the act to incorporate the *Canal Company* became a public law of the State, though not at that time operating as a grant, not being then accepted. The act of the 6th March, 1826, *ch.* 180, for the promotion of internal improvement, in which a company called *The Maryland Canal Company* is incorporated, to make a canal “from some convenient point on the *Potomac* river, intersecting or continuing the *Chesapeake and Ohio Canal* to the city of *Baltimore*,” gives authority to the treasurer, to subscribe for the stock of the *Chesapeake and Ohio Canal Company*, to the whole amount of the stock of the *Potomac Company* held by the State, and of the debt due to the State by that company, and of half a million of dollars besides.

Thus recognizing the act to incorporate that company as a subsisting law in all its integrity, vesting her capital to a large amount in its stock, and treating it as part of a more extended scheme of internal improvement—and by the provision for a canal to be made by the *Maryland Canal Company*, “from some convenient point on the *Potomac* river, intersecting, or continuing the *Chesapeake and Ohio Canal* to the city of *Baltimore*,” plainly indicating the understanding and intention, that the *Chesapeake and Ohio Canal* should be made on the *Maryland* side of the river: otherwise it could not be intersected or continued to *Baltimore*, by the *Maryland* canal. The act of the 8th of March, 1826, *ch.* 200, giving permission to the State of *Pennsylvania*, to connect a canal or rail way with the *Chesapeake and Ohio Canal*, again recognizes it, as a subsisting law. The act of the 5th of February, 1827, *ch.* 78, to amend the act, to incorporate the *Canal Company*, requiring by the 4th sec-

tion, in order to give it validity, that it should receive the assent of the legislature of *Virginia*, of the *Congress* of the *United States*, and of the *Potomac Company*, styling them in the first section necessary parties; and declaring in the 3d section, *that nothing in that act, shall be held to discharge the company from a compliance with each and every of the conditions of the original act, except so far as they are expressly altered by the provisions of that act*, which only relates to a part of the canal above *Cumberland*, not only treats it as a law in full force, but as a favorite measure of the State, and exacts from the company whenever it should come into existence, a rigid compliance with all its provisions; and on the 28th of February, 1827, the rail road charter was passed. Now is it to be believed, that on the 28th of February, 1827, the legislature intended by the rail road charter, to repeal any part of the canal law, which had been up to that time, so recognized and fostered by the State, and to the stock of which, considerably more than half a million of the State's capital funds had been authorised to be subscribed; or in any manner to abrogate, alter, limit, or restrict, or to authorise any interference with any of its provisions? On the contrary, is it not manifest, that the legislature had no such intention? Can it be, not only that the legislature, but the same body of individuals, who, on the 5th of February, 1827, had, in the act to *amend* the canal law, declared that it could not be done without the assent of the legislature of *Virginia*, of the *Congress of the United States*, and of the *Potomac Company*, as necessary parties, even for the purpose of enlarging the powers of the contemplated company, and had also required a strict and full compliance with all the provisions of the law except as therein altered, intended on the 28th of the same month, only twenty-three days afterwards, and at the same session, by its own separate and independent act, *proprio jure*, to repeal any part of that law, or to limit or restrict any of its provisions, or authorise any obstruction to the exercise of any of the rights or powers originally intended to be conferred by it, whereby the ca-

nal might either be arrested altogether in its progress, or driven from the State: which, so far as *Maryland* is concerned, would amount to a virtual repeal of the law; and that too, in favor of an institution, the relative value of which, was not then well understood? If the question could now be put to the members of the legislature who passed the rail road charter, whether they had, or not, any such intention, it cannot be doubted what the answer would be; and that, is not an unapt test of the intention. It was certainly not the interest of the State, to do any thing to obstruct the canal in its progress, or to force it from the State; nor does it appear that any interference with it, was in the contemplation at the time, of the projectors of the rail road. But there are other subsequent legislative acts upon the subject, showing the understanding and intention of the legislature.

On the 10th March, 1827, at the same session, and only ten days after the rail road charter was passed, the canal law, with all its provisions, was again recognized by the legislature, in the supplement to the act for the promotion of internal improvement, *chap. 211*, modifying, by the first section of it, the condition on which half a million of dollars had before been authorised to be subscribed to its stock, and continuing the authority to subscribe that amount; which would hardly have been done, if the legislature had understood that only ten days before, they had by the rail road charter, authorised such an interference with the location of the canal, as might have the effect to force it from the *State of Maryland*, or destroy it altogether. The act of the 2d January, 1828, further to amend the canal law, requiring the assent of *Congress*, of the legislature of *Virginia*, &c. was not only a further recognition and affirmance of all its provisions, except as thereby intended to be altered; but by requiring the concurrence of *Virginia*, *Congress*, &c. whenever it was intended directly to alter the law in any particular, furnishes strong evidence, that they did not intend when passing the rail road charter, indirect-

ly to alter or repeal any part of the canal law. On the 3d March, 1828, by a supplement to the act for the promotion of internal improvement, *ch.* 104, authority was given to the treasurer, to subscribe for five thousand shares of stock in the *Baltimore and Ohio Rail Road Company*; and on the same day, and immediately following, authority was given to the treasurer, by a further supplement to the same act, *chap.* 105, to subscribe for the same number of shares of the stock of the *Canal Company*, reciting the importance it was of to the State, *effectually to secure the completion of the work*, if ever commenced. What work? Surely the canal, as provided for by the terms of the law. Thus, two supplements passed on the same day, treating the two contemplated works, as branches of the same general system for the promotion of internal improvement, and giving a preference to neither; but extending the same aid to each, by subscribing equally, to the stock of both. Those various, precedent, concomitant, and subsequent acts, demonstrate the intention of the legislature to have been, not that the rail road charter should repeal the canal law, or any part of it, or that the rail road should displace the canal; but that the law to incorporate the *Canal Company*, and all its provisions should remain in full force. With this manifest intention of the legislature, in the absence of any express, or necessarily implied repeal of the express provisions of a prior law, and with no plain and unavoidable repugnancy between the two laws, the rail road charter ought to be so construed if it can be done, as that both may stand, and the intention of the legislature be gratified—and not so, as by the practical application of it, to defeat the intention of the legislature, if by a reasonable construction it can be avoided. A construction of the rail road charter, that would have the effect to obstruct the route of the canal along the valley of the *Potomac*, on the *Maryland* side of the river, would be a virtual repeal of the *Maryland* law; since if it cannot be enforced here, it can be enforced nowhere—which was clearly not intended by the legislature, but would be the effect of con-

struing the words *any land*, used in the rail road charter, according to their most comprehensive and extended sense, as contended for on the part of the *Rail Road Company*; as *any land*, would embrace any land in the State, whether in the valley of the *Potomac* or elsewhere, and under any circumstances. But if construed in a more limited sense, and so as to entitle the *Rail Road Company* to occupy with the road, any land not required for the practical operation of the prior law, both may stand according to the intention of the legislature, made evident by the general and uninterrupted course of legislation, in relation to them, at every session from the date of the canal charter, to the time of the institution of this suit; and especially, in their avoiding to make any *amendment* of the canal charter, without the assent of *Congress*, the legislature of *Virginia*, &c. (and much less therefore, would they have intentionally repealed it,) and in authorising subscriptions for an equal amount of stock in both, and constituting them independent branches of a great system of internal improvement. And that construction should be given to the rail road charter, the construction of the *road* in the valley of the *Potomac*, not appearing to be necessary, to the full execution of the charter; and the *road* not being *required* by the charter to be made in that region—whereas the *canal* is not only required to be made in the valley of the *Potomac*, but according to the proof in the cause, can be made nowhere else, and if not made on the *Maryland* side of the valley, cannot be made at all under the *Maryland* law, viewed as a mere separate and independent charter of this State, without reference to the law of *Virginia*: which as such, could not authorise the construction of it, any where but in *Maryland*. And as the validity of the *Virginia* law, is made by its terms to depend upon the concurrence of *Maryland*, if the canal charter, as a law of *Maryland*, was repealed by the rail road charter, and the assent of the State to the *Virginia* law thus withdrawn, the whole charter thereby became inoperative and void. But by construing the words of the rail road charter,

in the sense suggested, full effect will be given to both charters, and the faith of the State preserved unimpaired, which it was never the intention of the legislature to violate; and if no other construction could be put upon the words of the rail road charter, than that contended for on the part of that company, the use of those terms, would clearly have been a mistake on the part of the legislature.

It would be doing injustice to the legislature, to suppose that they intended to start those two great companies on a race, for the ground best suited to their respective purposes, with a stake of half a million of dollars on each, by which the State might lose a large amount; in the event of one, being obstructed in its progress by the other, with no prospect of gain, instead of sending them forth, each to pursue its own independent course, without any interference or conflict with the other. It has been urged in argument, that the proviso in the supplement to the act for the promotion of internal improvement, to the subscription authorised to be made to the stock of the *Rail Road Company*, that the company “shall agree so to locate said road, that it shall go to, or strike the *Potomac* river, at some point between the mouth of the *Monocacy* river, and the town of *Cumberland*, and that it shall go into *Frederick*, *Washington*, and *Alleghany* counties,” shows the intention of the legislature to to have been, to authorise the *Rail Road Company* to make the road in the valley of the *Potomac*, notwithstanding the provisions of the canal charter, if they could first appropriate ground in that region for the route of the road. But it will be remarked, that, that proviso is no part of the charter of the *Rail Road Company*, and was only a condition, upon which the stock of that company was authorised to be subscribed for, on behalf of the State, and whatever might have been the object of the legislature, in annexing that condition, it cannot have the effect to show, what was the original intention of the legislature at the time of passing the rail road charter, and to overthrow all the legislative evidence, that is exhibited, of a different intention. Nor ought a

mere condition, on which the legislature thought fit to subscribe for stock of the *Rail Road Company*, with nothing more, to have the effect to repeal the canal charter. And the requiring as a part of the condition, that the road should “go into *Frederick, Washington, and Alleghany* counties,” was not to require that it should pursue the course of the river: since it might go into all those counties, without pursuing the course of the river, even after going to it; and with more advantage to those counties, (which it would seem to have been the intention of the legislature to benefit by the condition,) as a road passing through their interior, would necessarily diffuse more general benefit and convenience, than one, merely running along their borders. It is possible, that the legislature did entertain doubts whether the canal would ever be commenced; no company having then been formed; and that under the influence of such doubts, they annexed to the subscription to the stock of the *Rail Road Company*, the condition that the road should go *to the river*; not for the benefit of that company, but in order to diffuse as widely as might be, the advantages to the community of that institution. But with no intention to prevent either the commencement, or completion of the canal, by requiring the road to be constructed along the borders of the river, to the exclusion of the canal. And that is not the meaning of the condition, as is sufficiently shown, by the recital in the immediately following supplement to the same act, of the importance to the State, of “*effectually securing the completion of the canal, if ever commenced* ;” which conclusively evinces the determination of the legislature, that the canal, if ever commenced, should be completed according to the provisions of the charter, without hinderance by any other institution. Moreover, exclusive of subscriptions, payable in the stock and debts of the *Potomac Company*, there had been on the 14th November, 1827, more than a million and a half of dollars subscribed to the stock of the *Canal Company*, by individuals and the district corporations, and the amount re-

quired by the charter, paid on each share at the time of subscription, whereby extensive interests and incipient titles had been acquired, and the public faith pledged, that each subscriber should hold and enjoy his stock upon the terms and conditions expressed in the charter, and on which he had subscribed and paid his money,—after which, it was too late, consistently with good faith, to alter the terms and conditions of subscription; or in any manner to lessen the value of the stock, or vary the condition or interest of the subscribers, without their knowledge or consent. Under such circumstances, with the subscription books still open, and an invitation held out to all the world, under the authority of the State, and by the charter, to come in and subscribe for stock according to its provisions as they then stood; and there being also, then pending in *Congress*, a bill for a subscription to the amount of a million of dollars to the canal stock, it is not, and cannot be believed, that the legislature intended on the 3d March, 1828, by the proviso annexed to the subscription to the rail road stock, to authorise and require that company, so to locate, and construct the road to the *Potomac* river, and along the valley, as either to arrest altogether the progress of the canal, or force it out of this State into *Virginia*; or in any way to limit and restrict the provisions of the canal charter; or do more, than to provide as far as it could be done, for the event of the failure of the canal scheme, which might have been apprehended; but which, the *same* legislature, immediately afterwards on the *same day*, and by a further supplement to the *same act*, which together, are to be taken and construed as one law, manifested a determination to prevent, by authorising a subscription of half a million of dollars to the canal stock, on such conditions, (in their own language,) “as would effectually secure the *completion* of the work, if *ever* commenced,” which is wholly at war with any intention to repeal the canal charter, or to abrogate or restrict any of its provisions; or to *require* or *authorise* the *Rail Road Company* to *obstruct* or *displace* the canal, by being the *first*

to acquire title, by purchase or condemnation, &c. to any land in the valley of the *Potomac*, deemed necessary for its route and construction.

The acts of the legislature of *Maryland*, passed on the 22d Feb. 1831, and of *Congress*, on the 2d March of the same year, have been pressed in the argument on the part of the *Rail Road Company*, but do not seem to have any bearing upon the question involved. The former being “an act to promote internal improvement, by the construction of a rail road from *Baltimore* to the city of *Washington*,” and only authorising the construction by the *Baltimore and Ohio Rail Road Company*, of a rail road from some convenient point on that part of the *Baltimore and Ohio Rail Road*, which had then been constructed, and was in use, not exceeding eight miles from the city of *Baltimore*, to the line of the State, adjoining the *District of Columbia*, in a direction towards the city of *Washington*. With no relation whatever, to a location of the *Baltimore and Ohio Rail Road* in the valley of the *Potomac*, which is in a different direction, and far beyond the point on that road, from which the proposed road from *Baltimore* to the city of *Washington*, is authorised to be constructed, and not in the remotest manner tending to sanction such a location of the *Baltimore and Ohio Rail Road*, or to show the original intention of the legislature to have been, to repeal any part of the canal charter, or to authorise the *Rail Road Company* so to locate that road, as to obstruct, or in any manner interfere with the passage of the canal, along the valley of the *Potomac*, upon the *Maryland* side of the river. The making the contemplated road from *Baltimore* to the city of *Washington*, not being dependent upon, and having nothing to do with the question, whether the *Rail Road Company* has or not, a right to construct the *Baltimore and Ohio Rail Road* in the valley of the *Potomac*, but may be made whether that right exists or not, and without any reference to it; and even, although the rail road never should be completed to the valley of the *Potomac*. Just as well may

any law, which may hereafter be passed, for making branches from any part of the rail road that is completed, be said to show the intention of the legislature to have been, to confer upon the *Rail Road Company* by its charter, the right to exclude the canal from the valley of the *Potomac*, by first occupying the ground, as can the act of this State, of the 22d February, 1831. And the act of *Congress*, of the 2d March, 1831, does no more than merely to authorise an extension "into and within" the *District of Columbia*, of the road proposed to be made by that act; without any reference whatever, to the chartered rights of either the *Rail Road* or *Canal Company*, in relation to the occupation of the valley of the *Potomac*, or to any sanction, express or implied, of the claim set up by the *Rail Road Company*.

There were several minor questions discussed at the bar, which in the view that has been taken of the subject, it is not deemed necessary to examine. It may however, here be proper to remark, that had our minds been in a state of equipoise, the decree of the Chancellor, whose argument we regret not having seen, would have been affirmed; there being no appeal from a decree of reversal. But not entertaining that degree of doubt, which would alone justify a decree of affirmance, we should be unworthy of the trust reposed in us, if we were to shrink from the faithful discharge of our duty, only to commit the decision of the the cause to another tribunal. These observations are elicited, by our having been reminded in the course of the argument, that in the event of a decision against the claim of the *Rail Road Company*, there could be no appeal; which we regret, but cannot honestly avoid the consequence.

The decree of the Chancellor is reversed, and the bill dismissed with costs.

EARLE, and STEPHEN, J. concurred.

ARCHER, J., dissented, and delivered the following opinion:

A collision having arisen between the *Rail Road* and *Canal Companies*, in the designation of a route for their improvements, a removal of the difficulty is sought in the judgment of this court, in the exercise of its appellate, equitable jurisdiction.

The solution of these difficulties will be found in the determination of the legal priority, which one company may have over the other, and in the examination of their respective equities.

The canal claims priority over its rival company upon the ground, first, of her *derivative* rights arising by assignment from the *Potomac Company*, and secondly, from her *original* rights springing from the law which created her. These pretensions shall be severally examined. In their investigation, the comparative rights of the *Rail Road Company* will be necessarily reviewed.

1st. The *derivative* rights of the *Canal Company* will be first examined.

Without any particular reference to the laws in relation to the canal, it may be generally stated, that these gave to the *Canal Company*, the right of receiving from the *Potomac Company*, the surrender of its charter, and an assignment of all its rights and privileges, and the right to hold, use, possess, and occupy the same, to the same extent as the *Potomac Company* at the time of the surrender held them. The *Potomac Company* did accordingly, on the 15th August, 1828, execute its deed of surrender of the charter and rights above referred to.

This charter of the *Potomac Company* was granted in the year 1784, long anterior to the *Rail Road Company*, and if it was possessed of rights and privileges, which were interfered with by the rail road charter, its assignee, the *Canal Company*, must be protected in their enjoyment, as it would not be competent for the legislature, to disturb by her subsequent action, rights vested in pursuance of her anterior grant.

An attentive examination of the charter of the *Potomac Company* then becomes necessary, for the purpose of ascertaining her powers, rights and privileges. If this company had originally no power of making a continuous canal, or in consequence of lapse of time, had lost the power of acquiring land on the river, to make her improvements, no rights which she possessed, or property which she enjoyed, are at all interfered with; the *Rail Road Company* not seeking to disturb its works heretofore erected, or to interfere with the navigation of the river, by its locations, but desiring only to pursue its unoccupied margin.

If it were legitimate to look beyond the laws creating this corporation, to discover the designs of the legislative body, in its creation, they would be observed in a light too glaring to escape the dimmest vision. Previous to December, 22, 1784, commissioners had been appointed by the States of *Maryland* and *Virginia*, to confer together on the subject of opening and improving the navigation of the *Potomac river*, and, on that day, they proceeded to consider the subject referred to them, and came to a variety of resolutions recommendatory to their respective principals. Some of these will be adverted to.

“That it is the opinion of this conference, that the removing the obstructions in the river *Potomac*, and the making the same capable of navigation, from tide water, as far up the north branch as practicable, will increase the commerce of *Virginia* and *Maryland*.”

“That it is the opinion of the conference, that the proposal to establish a company for opening the river *Potomac*, merits the approbation of the two States.”

“That it is a general opinion that the navigation on the *Potomac* may be extended to the mouth of *Stony Run*.”

“That the States appoint skilful persons to view, and accurately examine and survey *Potomac*, from *Fort Cumberland* to the mouth of *Stony* river, and the river *Cheat*, from about the *Dunker* bottom to the present navigable part thereof, and if they judge the navigation can be extended

to a convenient distance above Fort Cumberland, that they may from thence survey, lay off, and mark a road to *Cheat* river, or continue the same to the navigation, as they may think will most effectually establish the communication, between the said eastern and western waters.”

The object and intent of this conference was manifestly not to *canal* the river, but to render *its bed* navigable, for it speaks constantly of making the *river navigable*—how? by canalling? no, but by *removing obstructions* in it. The great object was, to produce a communication with the western country, not by a canal, but by the conjoint means of the *river itself*, whose navigation was to be made passable by clearing its obstructions, and by roads across the ridges of the *Alleghanies*, to certain designated navigable waters of the west. Out of the results of this joint commission, grew the charters granted by the respective States to the *Potomac Company*, passed immediately after the labors of the commission had closed, and it is remarkable how closely the States pursued the recommendation of their commissioners. The great agent which each created, for effecting this object, so strongly recommended, of improving the *navigation of the river*, was the *Potomac Company*.

But if we cannot look at the anterior proceedings of the States, to fix their designs in the creation of the charter of the *Potomac Company*, even where the charter is not inconsistent with the intent thus indicated, and it may be well assumed, that the charter is the only legitimate index of the legislative intent—then, it is just as clear, that the design of the charter, is identical with the designs as expressed previously by the commissioners, with this exception, that the States foresaw, that there existed impracticabilities in the removal of obstructions, in particular places or passes of the river, arising from *falls*, which might render occasional canalling necessary.

Let us examine, with some minuteness, the provisions of this grant, that we may be enabled, the more clearly to discern its character.

Both the charters of *Maryland* and *Virginia*, as regards this question are identical.

The title explains the whole scope and object of the law. What is it? “An act *for opening and extending the navigation of the Potomac river.*”

Now let us refer to the recital—“Whereas *the extension of the navigation of Potomac river* from tide water to the highest point practicable on the *north branch*, will be of great public utility, and many persons are willing to subscribe large sums of money to effect so laudable and beneficial a work; and it is just and proper that they, their heirs and assigns, should be empowered to receive reasonable tolls, forever, in satisfaction for the money advanced by them in *carrying the work into execution*, and the risk they run.”

Thus we perceive, that the *preamble*, like the *title*, looks constantly *to the river*, whose navigation is to be improved—and the *opening of its navigation*, as the work which is to be accomplished. But the preamble proceeds: “And whereas *it may be necessary* to cut canals and erect locks” (*not a continuous canal, but canals*) and other works on both sides of the river, and the States, impressed with the *importance of the object*, are desirous of encouraging so *useful an undertaking*: Therefore, &c.” Now, what undertaking is here referred to? Is it not that which had been previously referred to—the *opening of the navigation of the river*? and can the word canals be tortured to mean one continual canal? On the contrary, does it not obviously pre-suppose that the river, in some places, may be innavigable even by art, and that hence, in such places there may exist a necessity, in order to preserve a continuity of navigation, that such barriers should be avoided by canals, otherwise the great work of *opening and improving the navigation of the river* might have been defeated.

The 9th section more clearly specifies this power of *cutting canals*, and in *express* terms defines and declares the object of such a grant. The following is the language,

“That for and in consideration of the expenses the proprietors will be at, not only, in cutting the said canals *for opening the different falls of the said river*, and in improving and extending the navigation thereof, the canals and profits are vested in the proprietors in fee, it is deemed real estate exempt from taxation, and they declared to be entitled to tolls.” Thus the canals authorised to be cut, are declared “*to be canals round the falls of the river*,” and the legislature here distinctly recognise two objects within the grant. 1. *The cutting of canals round the falls*; and 2dly, the *improving and extending the navigation of the river itself*. For this section, as we have seen, says the company will be at expense in cutting canals round the falls, and in improving and extending the navigation of that river : thus all idea of one continuous canal is not only impliedly repudiated, but is without the express terms of the grant—for a river navigation is looked to where not impeded by falls, and where falls interfere, canals.

The 10th, 17th, and 19th sections, are in furtherance of the same construction, and will justify no other.

The 10th section enacts, “*that the said river*, and the works to be erected thereon, in virtue of this act, when completed, shall forever thereafter be esteemed and taken to be navigable as a public highway, free for the transportation of all goods, commodities or produce whatsoever, *on payment of the tolls imposed by this act*.” Now, if it was designed, that the *Potomac Company* should make one continuous canal, and abandon the improvement of the bed of the river, it is inconceivable that the company should have been permitted to retain the right of collecting tolls, for the transportation of produce down *the channel of the river*. Because, instead of improving its navigation, so as justly to render those who passed down it liable to a toll, it had abandoned the river, by making a continuous canal, and had, by abstracting thereby so large a quantity of water from its current, in all probability lessened the value of the stream itself to the public, as a navigable river. Instead of a continuous canal

having been in contemplation, this section clearly shows, that the improvement of the river and canals as before, were contemplated, because tolls are imposed on produce passing down *the river and the works thereon*, and the *river and the works thereon* are declared to be a public highway.

The 17th section is also perfectly explicit, where it declares, that "*the Potomac Company shall make the river well capable of being navigated in dry seasons, by vessels drawing one foot water.*" Now a continuous canal would have a tendency, by *lessening* the quantity of water in the river, to defeat this express requisition—that of making the *river* navigable in dry seasons. And the 19th, pursues the same object, and is illustrative of the same design. "Be it enacted, that all the commodities which may be transported on the canals and river, may be landed and sold, subject only to such impositions as the like goods are liable to, in the state where landed." Here the transportation of goods *down the river* is spoken of, and also through the canals. What canals? Why the canals spoken of in the 9th section; "*the canals round the falls.*"

Thus the title, preamble, the whole scope and object of the grant, all the sections adverted to, refer distinctly and explicitly to the improvement of the bed of the river, unless where that is rendered impracticable by falls, and then, they were to canal. Thus their powers are clearly limited and defined, and they would have possessed no power to make a continuous canal, and consequently were destitute of all power to condemn land for any such purpose.

All the sections of the charter having any reference to this branch of the subject, have been adverted to, except the *fourth* section, and having thus ascertained the general scope and object of the legislature, and what it is, that this company was incorporated for, I shall advert to that section. "The company shall have power and authority to agree with any person, or persons, to cut such canals, and erect such locks, and perform such other works, as they shall judge necessary, for opening, improving, and extend-

ing the navigation of the said river above tide water, to the highest part of the north branch to which navigation can be extended, and carrying on the same from place to place, and from time to time, and upon such terms, and in such manner as they shall think fit." It is upon this section, that the *Canal Company* insists, that powers were imparted to the *Potomac Company*, to make a continuous canal. Now, whatever power this provision might, if it stood alone, be supposed to grant, it must be admitted, that its phraseology is capable of being controlled by the scope and object of the law, to be deduced from its provisions generally. Thus, when it is said, they may perform these works *from time to time*, this would seem to give them an unlimited range. But the words from time to time must be controlled, and governed, by the limitation assigned in their charter, for the completion of their work. Again, when it is said, these canals, locks, and other works, are to be done *in such manner as the company shall think fit*; this generality of expression must be restricted to canals and locks, of such size and dimensions, as might be prescribed in other sections of the law; and so when the general power is given to make such canals as they may deem necessary, it means such canals as are spoken of in the 9th section, "*canals for opening the falls of the river.*" It is not my intention to assert, that they were confined in their power to make canals, to the *Great and Little Falls*, but had a general power to make a canal around any falls of the river, which impeded its navigation. But in the exercise of their judgment, of what canals were necessary, they were restricted to the making of them only where falls existed; and it would have been a perversion and evasion of the law, to have *made either* a continuous canal, or a canal where no falls existed, or no impediment existed in the navigation of the river *by its natural course*. It is no answer to this, to say, that a continuous canal would better have subserved the public interests, and better have gratified the wishes of the legislature, by giving certainty and safety to the transportation of

produce from the north branch to tide water; for the legislature have not chosen to say so, they desire alternate river and canal navigation; they desire the river to be opened and improved, and the difficulties interposed by falls, surmounted by canals. And having intelligibly impressed these dispositions on their grant, a court of justice should give it efficacy as they find it; and has no power to do any thing else. They must expound the grant, and not frame one, because they might perchance think, that a grant thus judicially framed, would better subserve the public welfare.

The same construction which is above given to the *Potomac* charter, has from its very organization, been given to it by the parties interested, by the States of *Virginia*, *Maryland*, and the *Potomac Company* herself. At November session, 1797, that company stated, that they had removed most of the obstructions in the *Potomac* river, from *Savage* river to tide water, that they had erected locks at the *Little Falls*, and made a canal at the *Great Falls*, but had not completed the locks thereat; whereupon the legislature authorised that company to receive tolls, conceiving that their great scheme of improvement, as contemplated by the charter, had been so far advanced, as to justify the grant of liberty to take tolls. And the legislatures of the two States, go on from time to time, *Maryland*, for the period of twenty-nine years, in extending time to the *Potomac Company* to complete the navigation of the *Potomac* river; thereby recognising the mode of improvement pursued, as the proper mode, and the construction put upon the law as the true one; and *Virginia* has even gone farther, and has extended the time for thirty-six years, from the passage of the law. And as if to give greater efficacy to what has been done, and to confirm, if it wanted confirmation, that the construction was strictly according to the charter, *Maryland*, by her law of 1802, ch. 84, declared “that the object contemplated by the act of Assembly, for establishing a company for opening and extending the navigation of the

river Potomac, had been accomplished.” Again, in the act of 1786, extending the time to the company, for completing the navigation, the legislature declare that their reason for the enactment of the law was, “that the two last summers had been so unfavorable to the work of making and improving the navigation above the *Great Falls*, in the *Potomac river*.” We may easily imagine, how much the occurrence of freshets in the river, would interfere with the works of a company which had to make the river navigable in dry seasons, by clearing out obstructions; but if their business and duty had been to make a continuous canal, there must have been the occurrence of two very unusual and extraordinary summers, to have been pronounced by legislature so very unfavorable to the digging and construction of a canal. The act of 1790, *ch. 35*, which authorised the company to apply the tolls, received for the improvement of the branches of the river above *Seneca*, contains this provision, “Provided that no such application shall be made *until the main river, from tide water, is cleared to Fort Cumberland.*” Here the main river is spoken of. It is to be made navigable not by a continuous canal, but by *being itself cleared*. And by an act passed in the year 1814, being a supplement to the charter, power was given to the *Potomac Company* to acquire lands, contiguous to the canals and locks on the river, by purchase, compromise, and exchange, but with the proviso, “*that the said company shall not, at any time, hold more than one thousand acres of land in this State.*” Notwithstanding the general power to purchase land contiguous to their canals, all the land they are to hold, both that which is occupied by their canals, and such as they should purchase contiguous to them, was not to exceed one thousand acres. With this express limitation, who will or can say, that it ever was intended to grant any power, to make a continuous canal from *tide water* to the highest practicable point on the north branch, a distance of from one hundred and twenty to one hundred and fifty miles, and considerably more,

following the sinuosities of the river. A moment's calculation will show, that instead of being able to purchase any land contiguous to their canals and locks, one thousand acres, the extent of their power to hold, would have been exhausted, before they could have reached half the distance from tide water westwardly, with a continuous canal.

Thus, whether we look to the charter itself, or to the practice, acts, and understandings of the parties under it, its exposition is freed from all doubt; and clearly, there was at no time power to make a continuous canal, and it was never so thought, or understood, by the parties or either of them.

The right of the *Potomac Company* to condemn lands, has long since ceased, not by any forfeiture of its charter, but by limitation of time. In speaking of this limitation, it is only meant to refer to the right of condemnation, along the disputed and contested territory. It may still possess the right to condemn land, from the town of *Cumberland* to the highest place to which navigation is practicable, on the north branch of the river, unless the company accepted some of the amendments of the charter; for between those two designated points, there seems to have been no limitation of time in the original law, with regard to its powers in this respect. But from the town of *Cumberland* to tide water, *Maryland* had bound her to complete her works by the 1st January, 1813, from *Great Falls* to the town of *Cumberland*, under the following penalty, "that it should not be entitled to any benefit, *privilege*, or advantage under her charter, and from the *Great Falls* to tide water, under the penalty of a forfeiture of all her rights to tolls, and all her preferences to a navigation of the river." And it was under the same obligations, and liable to the same penalties under the *Virginia* charter, except that, by that, and its supplements, it had the time extended until the 1st January, 1820. Now it so happens, that the very portion of the river, and its contiguous country, now in litigation, from the town of *Cumberland* to the *Great Falls*, is the subject of this limitation. Whether the right to condemnation still continued

in the company, higher up than *Fort Cumberland*, we are consequently not concerned to inquire.

The continuation of the company, notwithstanding the limitation of time, for the exercise of its ordinary franchises, even if it had not completed its object, there never having been any process in a legal tribunal for vacating its charter, is not the question presented for consideration; but the question is this, could that company, after the time limited, exercise its *extraordinary power of condemning land*, whether its works were or not completed.

The power of condemning land, and appropriating it for the use of the company, was a high attribute of sovereignty, was in derogation of the rights of the citizens, and ought to be construed rigidly, and made subject, in the strictest degree, to all the limitations imposed upon it by the sovereign power; and denying to it this power, when the question comes collaterally, or incidentally into litigation, in a court of justice, in no manner affects the common and ordinary franchises of the corporation, but leaves them all subsisting, to be exercised in their accustomed mode, until there shall be a regular judicial forfeiture, while at the same time, every citizen has it in his power to guard himself against the illegal seizure and appropriation of his land, and is not called upon to solicit the intervention of the sovereign power to establish the fact of a forfeiture of franchises, before he could hope for a vindication of his rights.

We accordingly see the parties to this grant, constantly acting upon this principle. The *Potomac Company* never seeking the passage of laws denying the right to have their charter forfeited, but asking time to extend their works in the mode pointed out by the laws, and neither the company, nor the legislature, ever looking back to periods of time which had elapsed, not covered by any of the laws extending the time, but always forward to the exercise of those powers conferred by their charter, which would be necessary to enable them to complete the work they had undertaken.

If the company failed to complete her works from the *Great Falls* to *Cumberland*, in the language of the 17th section, she was no longer entitled to her *privileges*, one of which was, the purchase and condemnation of land within those limits; and a title, either by the one mode or the other, would have been just as unavailable, as it would have been, had the charter declared, that the title acquired at such a time, and under such circumstances, should be void, and the company might at all times have been restrained by a court of equitable jurisdiction, from the acquisition of title by such means, after the time limited by the law, had elapsed.

And if she had on the contrary, completed all the objects in the contemplation of the legislature by that charter, within those designated points, it cannot be contested, with success, that they nevertheless still retained the power of condemning lands.

That these works had been completed in view of all parties, is not to be disputed against a clear, legislative, declaration to that effect. The original charter only authorised the exaction of tolls, upon their completing the extension of the navigation from *Cumberland* to the *Great Falls*, and from those falls to tide water. In 1802, *ch.* 84, the legislature of *Maryland* passed a law with the following preamble:—"whereas the object contemplated by the act of assembly, for establishing a company for opening and extending the navigation of the *river Potomac*, has been accomplished,"—and then enacted, that she should take the tolls as originally prescribed, thereby recognizing in the fullest and clearest manner, the entire completion of the work, at least within the designated points. To fulfil its engagements then to the public, the *Potomac Company* had nothing further to do, for she had the declaration of the highest functionaries of the State, that she had performed them. The act of 1809, further extending the time, furnishes no argument against this view, because, although the company had completed her work, she may have desired the re-establishment of her former powers, which are by this law

admitted to have expired, for the purpose of rendering more perfect her works, for her own profit and advantage.

If then, she had completed all the works assigned her by the charter to perform, for what purpose should the law repose in her, for an indefinite period, the power to condemn lands, or why should she retain those powers for a moment beyond the period assigned?

For what purpose was the power to condemn, granted? The 11th section informs us—"And whereas it is necessary for the making the said canals, locks, and other works, that a provision should be made for condemning a quantity of land for the purpose"—therefore the power is given.

Now, if all the canals, locks, and other works, are made and completed, and we have the legislative declaration that this was done, where the necessity for the existence of the power, and did it not, by the terms of the grant expire with the accomplishment of that, which it was intended to effect? Argument cannot make this proposition plainer, or carry greater conviction to the mind of its truth, than its mere statement.

But it is said, the company had a right to adopt one mode of improvement, then abandon it, and commence, and prosecute another. That she might make canals where none were made before—let this be admitted. Still she must execute all these powers within the limited time prescribed by the charter, otherwise, she is transcending the powers granted.

It therefore appears, that the *Potomac Company*, having no powers at the date of her assignment, to make a continuous canal, or to condemn land, could confer no rights or privileges to the *Canal Company*, its assignee, which could give it a priority over the rail road, or any right against that company, which only takes the unoccupied margin of the river.

The *Canal Company*, possessing no derivative rights to priority over the *Rail Road Company*, as we have seen,

plants herself upon her own original charter, and claims, that it gives her a precedence.

This brings us to the consideration of *the original rights of the company*.

This claim, it is said, is fully supported, whether the *Canal Company* be considered as obtaining her grant from the State of *Maryland* alone, or from the *United States, Virginia, and Maryland*.

These claims will be separately examined.

Let us first suppose the grant to be from *Maryland* alone, unaffected by any compact with other States.

At what time did the law of *Maryland* go into operation? At what time was the *Canal Company* incorporated? To what period had it relation?

After having severally examined these questions, for the purpose of fixing a day, on which the rights of the *Canal Company* came into being, it is proposed, to examine the course of *Maryland* legislation, anterior to the date which shall be thus ascertained, and to determine its character and validity, as affecting the rights and interests of the parties.

1. At what time did the law of *Maryland* go into operation?

The State of *Virginia*, in her first law, by its 21st section, had reserved to the States, the right within their respective territories, of tapping the canal by any canal they might think proper to construct; and had made her whole act to depend upon the following proviso: "Provided that before this act shall take effect, the *Congress* of the *United States*, shall authorise the States of *Maryland* and *Virginia*, or either of them, to take and continue a canal from any point of the above named canal, or the termination thereof, through the territory of the *District of Columbia*, or any part thereof, to the territory of the said States, or either of them, in any direction they may deem proper, upon the same terms and conditions, and with all the rights, privileges, and powers of every kind whatsoever, that the company have, to make the *Chesapeake and Ohio Canal*," with

this additional proviso: "that in taking or extending such lateral canals through the *District of Columbia*, no impediment or injury should be done to the navigation of the *Chesapeake and Ohio Canal*;" and the State of *Maryland*, in conforming and assenting to the act of the State of *Virginia*, added this *express condition* to her law, "that the act of *Congress*, contemplated by the 21st section of the *Virginia* act, shall provide some safe and practicable mode, whereby, such lateral canals may be secured to the State of *Maryland*, and whereby, also, it may be determined whether such lateral canals will injure the said *Chesapeake and Ohio Canal*, within the meaning and intention of the 21st section of the *Virginia* act." On the 3d of March, 1828, *Congress* assented to the act of *Virginia*, and enacted as follows: "should the State of *Maryland* or *Virginia* desire, at any time, to avail itself of the right secured to it by the 21st section of the act aforesaid, to take and continue a canal from any point of the *Chesapeake and Ohio Canal*, to any other point within the territory of the *District of Columbia*, or through the same, on application to the *President of the United States* by the executive of the State, the *President* is authorised, and empowered, to depute three skilful commissioners of the *United States'* corps of engineers, to survey and examine so much of the route of such canal as may affect, in any manner, the navigation of the *Chesapeake and Ohio Canal*. The said commissioners shall ascertain, as far as practicable, whether the canal proposed to be constructed, will injure or impede the navigation of the *Chesapeake and Ohio Canal*, and report to the *President*, the *facts* and reasons upon which they may ground their judgment thereupon, which report shall be submitted to *Congress* at the session next ensuing the date thereof, for their decision thereon; and if *Congress* shall be of opinion, that the said Canal may be cut in the manner proposed, as aforesaid, without impeding or injuring the navigation of the *Chesapeake and Ohio Canal*, the same shall be conclusive thereon."

It is perfectly apparent, that the condition above required by *Maryland*, was not fulfilled by this act of *Congress*, for, although, she had generally, given her assent to the law of *Virginia*, she had coupled that assent with a provision, which, at all times, left it in the power of either branch of *Congress*, or the *executive*, to prevent either *Maryland*, or *Virginia*, from conducting a canal through the *District of Columbia*; for whether it was at any time to be made, was to depend upon the fact, whether in the *judgment of Congress* the contemplated canal would injure or impede the navigation of the main canal; which, in other words, was an entire reservation to herself, of granting, or refusing, at any future time, the liberty demanded by the States of *Maryland* and *Virginia*, which, instead of being a compliance with the condition demanded by *Maryland*, that the right to make this lateral canal through the *District*, should be secured to her, was a direct negation of it. For, how could that right be said, in any manner, *to be secured*, which was to depend upon the judgment of one of the parties. *Maryland*, certainly never meant to submit her right, to tap the canal in the *District*, to either branch of the government, but *expressly* desired that *Congress* should *secure it*. How secure it? Why place it beyond the power of any one branch of the *United States'* government to impede, obstruct, or prevent her right? It is apparent, that *Maryland* did not consider the act of March, 1825, passed by *Congress*, as a fulfilment of her prescribed condition, for upwards of a year after the act of *Congress* was passed, that State incorporated a company by the name of the *Maryland Canal Company*, with powers to make a canal through the *District*, from the *Chesapeake and Ohio Canal* to *Baltimore*, and by the same law, authorized the subscription of 5,000 shares in the *Chesapeake and Ohio Canal Company*, but she made that subscription dependent upon the following condition: "that *Congress* should enact a law *expressly securing* to the State of *Maryland*, and to any company incorporated

by her, the right to take and continue a canal from any point of the *Chesapeake and Ohio Canal*, through the territory of *Columbia*, or any other part thereof;" thereby declaring in express terms, that *Congress* had never theretofore complied with the condition, which she had demanded, of *securing to her*, the fulfilment of the condition upon which her assent to the act of *Virginia* had been given; (act of 1826, *ch.* 211, *sec.* 21, an act for internal improvement) and insisting on *an express recognition of it* before her subscription to the *Canal Company* should be valid. It is true, that at the same session, December, 1826, at which the above demand was made by *Maryland*, she passed a supplement to the canal charter, which in its first section, recited that the act of *Virginia*, had been *assented to by Maryland, and by Congress*. And it is attempted to be shown from this, that *Maryland* had recognized the fulfilment, by *Congress*, of all the requisitions of her charter. But it is impossible to give such a construction to the words "*has been assented to by Congress*," when we look at the character of the condition which *Maryland* prescribed; at the character of its *attempted fulfilment by Congress*; and the explicit declaration made by *Maryland* at the same session, that she demanded an express fulfilment of her condition. The words above adverted to, have no reference, by any just construction, to the fulfilment of the condition, but only refer to the general assent given by *Congress* to the act of *Virginia*, without in any manner alluding to the compliance of *Congress*, with the conditions which she had prescribed. And in confirmation of this idea, we find that *Congress*, looking to the demand made by *Maryland*, on the 23d day of May, 1828, and not until then, passed a law expressly securing to *Maryland*, the right which she had demanded, and complying with the condition which *Maryland* had imposed on the validity of her charter. Neither the condition prescribed by *Maryland*, nor *Virginia*, had been complied with until that period, for both States required more than the consent of *Congress* to their acts; they required action on the part of that

body; *Virginia* demanded that she should be authorised by that body to make a canal through the *District*, possessing all the powers and privileges of the *Chesapeake and Ohio Canal Company*; and *Maryland* not only demanded this, but insisted, as an *express condition of her law*, that *Congress* should secure the right. Yet instead of doing this, although she had in general terms assented to the law of *Virginia*, her consent became qualified, and remained qualified until 24th May, 1828, with such stipulations in regard to the exercise of the right as to confer no authority, except one, dependent upon the judgment and opinion of a future *Congress*, and absolutely secured nothing to *Maryland*.

The general assent given by the act of *Congress*, of 3d March, 1825, by no means gratified the conditions of *Virginia*. She desired a law to be passed by *Congress*, to enable her to make a lateral canal, from the main canal, through the *District*, to her limits. Was this done? Let the first section of the law of *Congress* answer this question. “Be it enacted, that the act of *Virginia* entitled, an act incorporating the *Chesapeake and Ohio Canal Company*, be, and the same is hereby ratified, and confirmed, so far as may be necessary for the purpose of enabling any company, that may hereafter be formed, by the authority of the said act of incorporation, to carry into effect the provisions hereof, in the *District of Columbia*, within the exclusive jurisdiction of the *United States*, and no farther.” Now, this assent is expressly limited to the right of the *Chesapeake and Ohio Canal Company*, to construct a canal. Not a word is said or intimated as to the right of *Virginia*, to make a lateral canal through the *District*. Indeed this section was not intended by *Congress*, at all, to have any reference to the proposed lateral canal, but the second section exclusively referred to it, and we have seen, that it was no law authorising a lateral canal, but a law pointing out a mode by which some future *Congress*, possibly might see fit to authorise it.

The conditions then prescribed by the States of *Virginia* and *Maryland*, upon which they had chosen to make their legislation dependent, were never complied with on the part of the *United States*, until the 23d May, 1828, and consequently, on that day, her law had validity for the first time.

2. At what time was the *Canal Company* incorporated?

The 3d section of the charter declares, "that whenever one-fourth, or a gearter part of the capital stock of 6,000,000 of dollars, shall have been subscribed, then the subscribers, their heirs and assigns, shall be, and are hereby incorporated into a company, by the name of the *Chesapeake and Ohio Canal Company*."

It becomes then important, for the purpose of fixing the date of the incorporation, to ascertain at what period \$1,500,000 of the capital stock was subscribed, for it could not, by the express terms of the grant, until that time, have any life and being, for any purpose whatever. On the 14th November, 1827, on the supposition, that the conditions prescribed by *Virginia* and *Maryland* had been complied with by the *United States*, and that the law of *Maryland*, had consequently gone into operation, books were opened by commissioners, and the sum of \$416,900, was only obtained of *valid subscriptions*; and upon the 24th day of May, 1828, only \$562,700, were subscribed by persons, or corporate bodies, having any authority whatever, to subscribe. It is true, that in addition to those sums, the corporations of *Washington*, *Alexandria*, and *Georgetown*, had subscribed \$1,500,000, but those subscriptions were entirely invalid, not having been authorised by either of their charters, and within the meaning of the act, which certainly looks solely to an effective subscription, were, until some curative law was passed, absolute nullities. Such a law was passed by *Congress*, but not until the 24th day of May, 1828, at which period of time, and not before, the amount of subscribed stock, necessary within the charter, to bring the company into being, was obtained. The 24th day of May, 1828, con-

stitutes the day, then, of the actual incorporation. If it be said, that the act of *Congress*, of that day, had a retro-active operation, and gave validity to the subscriptions, from the 14th November, 1827, the day on which they were made, so as to give a being to the corporation on that day, the answer is obvious, and is of a two-fold character. 1st. There could be no subscriptions which could give life to a corporation, until the law existed creating the corporation, and we have just seen, that no law existed on the 14th November, 1827, nor at any period before the 23d May, 1828, for it was on that day, that the *Maryland* and *Virginia* acts went into operation. *Congress* then, for the first time, having complied with the conditions, upon which those States had thought proper to make their laws dependent. And 2dly. If the law of *Maryland*, on the 14th November, 1827, had been an effective law, the act of *Congress* validating the subscriptions, could have no other retro-active operation, than as against the municipal corporations, which it would bind from that day; but it could not operate retro-actively, against the rights of third persons, or bodies corporate, which had come into existence, and been vested, in the intermediate time, between the date of the subscription, and the date of its validation, which we shall hereafter see, would be the effect of such retrospective action, upon the interests and vested rights of the *Rail Road Company*, and its effect upon the legislative power of *Maryland*, would of itself, conclusively show that such a doctrine could not exist. The charter of *Maryland*, may be considered as a mere offer to incorporate, and until the offer is accepted, according to her intent in making the offer, she may recall or repeal her offer. Thus, she offers to incorporate, if a sufficient prescribed number of subscribers accept. No valid subscribers within the intent of the law do accept; she then retains the power to recall the offered grant. Would it be within the power of *Congress*, by validating those invalid subscriptions, to render null and void all intermediate acts of *Maryland*? By what provision of her law, has she

thus stripped herself of power? It is to be found no where, and to give a retro-active operation to the law of *Congress*, would clearly defeat the intent of *Maryland*, in the enactment of her law. If this validation is to have this effect, it must be sanctioned by *Maryland* law. A foreign legislative body can give no efficacy, to that, which the domestic law condemns. If this is thought to be correct, and it is not believed to be susceptible of a successful denial, the *Canal Company* had no corporate existence until the 24th day of May, 1828.

3d. To what period had the charter of the *Canal Company* relation?

Does it date its right and powers from the 23d May, 1828, the day on which, we have seen the charter was enacted? from the day on which the stock was subscribed, according to the requirements of the charter? or from the date of the *Maryland* act?

The course of *Maryland* legislation, from the period of the passage of her law, on the 31st January, 1825, until the *Canal Company* became incorporated by the required subscriptions, and by the entire fulfilment of the conditions upon which she had made her laws dependent, are not meant particularly to be adverted to here. They will be particularized, and commented on, hereafter. It will be sufficient, to bear in mind that *Maryland* had incorporated the *Rail Road Company*, and that the company had, anterior to the 23d May, 1828, adopted the contested route, and appropriated considerable portions of it, by actual surveys and locations.

The legislature of *Maryland*, upon the passage of her law, did not profess to give, or grant any thing. She merely declared, that she would grant a charter to make a canal, on certain conditions, whenever they should be complied with, and not before. It was a mere offer then, on her part, to the public, which only became obligatory when it should be accepted, and nothing more.

Relation, in its legal application to deeds, stands on intelligible principles, and is meant to carry into effect the intention of parties, by giving efficacy to such instruments, when they would be, otherwise, without the intended operation. Apply it here, and quite a different result is produced; the intention of the parties is perverted; what was only intended as an offer, is converted into a contract; that which was intended, and by express terms, to take effect at some distant period, when the terms of the act should be complied with, is made to operate against intention, immediately upon the passage of the law. The doctrine of relation, it is believed, has never been held to subserve such a purpose. It is founded always on a principle of equity, and is a fiction of law, introduced for the attainment of justice, and to prevent circuitry of action. Courts of law have applied it to uphold an equitable claim, against a subsequent legal title. As in the case of certificates, and payment of composition money, the grant is made to relate back to the date of the certificate, and dates the transmission of the legal estate from its birth, so as to override, and defeat all intermediate grants. In this, there is the greatest justice and reason, for what could be more unjust or unreasonable, than to permit the highest and clearest equity—an equity arising from the payment of the purchase money, to be defeated by a subsequent grant, merely because it happened to be clothed with legal solemnities. But in the case before the court, no equity grew up with the enactment of the law, to be protected by relation. No effective act was done under the statute, until the *Rail Road Company* had obtained a legal existence, and had given to itself a locality. Not only was no effective act done, until this event took place, but nothing of any kind was done by any one, through which he could, by any possibility, sustain any injury. For what purpose then, it may be emphatically asked, should the doctrine of relation be called in? If its aid is sought, it would here subvert all the rules upon which that salutary fiction of law has been established; it would defeat le-

gal rights, not for the purpose of supporting an anterior equity, but to give a subsequent legal right the preference.

It would be difficult, nay impossible, if the doctrine of relation does exist, and is applicable in the case of *offered* corporations, to say what would be the limitation to it. Twenty years could be no bar, for although that furnishes the ordinary presumption against a right, yet in the case of an *offered* corporation, there are no persons *in esse*, against whom the presumption could operate. The right only begins to exist, when a sufficient quantum of stock is subscribed, and that may be for an indefinite period. In short, the only possible limitation which could exist, would be the arrival of a period, when the inexecution of the law might give rise to the idea, that it had become obsolete, which would in truth extend it to an indefinite period; for courts of justice, it is believed, would hesitate in pronouncing, that from lapse of time alone, a law existing in the statute book, though dormant, and unexecuted through the whole period, had become a dead letter.

In this view of the subject, what would be the result of the application of the doctrine of relation to a subject of the character now before the court? An example will illustrate its evil consequences. A law passes, authorising the formation of an incorporated company, to make a canal from the sources of the *Potomac* to its mouth. It is to date its charter from the time its capital is subscribed, and it has imparted to it the eminent domain of the States of *Virginia*, *Maryland*, and the *United States*, over the whole country watered by it, or its tributary streams—a district, of at least two hundred and fifty miles square, extending from the *Chesapeake* to the *Alleghany*, and from the highest sources of the *Shenandoah* to the head of the *Monocacy*. Nothing is done to bring this corporation into existence for half a century. Then it unexpectedly springs into life. What are to be the results? Is it to overreach and defeat all intermediately formed canals, rail roads, and turnpikes; or are all these improvements to be absolutely terminated, and this entire region thus

condemned, to forego the advantages of the useful progress of legislation, enlightened by the advancement of science—and for what purpose? to gratify this notion of relation, which was never, even in the dreams of its framers, considered as applying, or at all referring to such a subject. Besides, its deleterious consequences to a whole region of country, its effects upon legislative action, would be novel and extraordinary.

It would deny to the legislature, in the absence too of all contract, its ordinary power, that of enacting and repealing laws, and under the same circumstances, would confide to one legislative body, the power of binding its successors to abstain from all beneficial and wholesome legislation. No principle which could operate this result, can be tenable.

In order to carry back the rights of the *Canal Company* to the date of the law, without regard to the time when the subscriptions were obtained, resort is had to *abeyance*, differing from relation, not in its consequences, but in the mode only of effecting them.

This doctrine of *abeyance*, like relation, is a fiction of law instituted to subserve the purposes of justice, and to carry into effect the wishes and intentions of the grantor; and has hitherto, only been applied to estates of inheritance, for the purpose of passing over the reversion or remainder to the person designed to take it; as in the case of a grant to A, remainder to the heirs of B, B being still living—or of preventing the falling in of such an estate, and its re-investment in the crown; as in the case of the grant of a dignity, when by death of the crown's beneficiary, there exists no representative, capable, by the grant, of taking it; the right is held in *abeyance*, until some one is in *esse*, capable of taking it by succession, according to the terms of the original grant. Wherever it has been applied, it has been of necessity. It is said in 3 *Cruise Dig.* 232, to be a doctrine which the law abhors, and a very distinguished writer on real law, as regards such estates, argues against its existence or necessity, altogether. *Fearne*, 361. Ad-

mitting its existence, it is said, in 1 *Cru. Dig.* 71, that in modern times, abeyance is not favored, because it is in restraint of alienation; and in the case of *Perin and Blake*, it was declared, that abeyance ought not to be extended, because, it prejudices the public, it ties up property, and leads to perpetuity. *Harg. Law Tracts*.

The application of the doctrine in this case, would be within none of the principles which gave rise to it. It must be remembered, that it is applied only in cases of necessity. Where a donor selects, as the object of his bounty, a person not in *esse*, having parted with his estate, there exists a necessity, that it should exist, to vest in the donee, when he comes into being to receive it; there, without either supposing the fee to remain in the donor to gratify his objects, which would be against the grant, or that it is *in nubibus*, the intentions of the donor must be defeated, and the donee could never take. But here the sovereign power is the grantor, which can impress upon the grant any powers of operation which it pleases: and can mould and modify it against all technical rules, whenever she shall please to do so. She might have pronounced, that the franchise should bear date from the law, without soliciting the aid of judicial fictions, to establish and give efficacy to her intentions.

We have seen that abeyance was introduced to give efficacy to estates, according to the intent of the grantor; this characteristic demonstrates its inapplicability here. The State never thought she had parted with any thing. Unlike the grantor or donor, who, by the words of the grant or gift, manifests a *present intention* to part with his estate, the State grants nothing, and means at the instant of her grant, to pass no right. She merely declares, that on the happening of some contingency in future, she will grant. She holds her law up, *as an offer merely*, and declares, that when any portion of her people shall accept that offer, they shall have certain powers imparted to them, and meant to place herself in no different condition, than an individual would

be placed in, who would offer to contract with another, and who, without any reservation of right, possesses at all times before acceptance, the right and power to withdraw *the offer*. 4 *Wheat.* 228. Now, if the doctrine of abeyance is applied, the State is held *to her offer* against her clear intent; a different rule is meted out to her, from that which would be applied to individual contracts, or offers to contract, and there would thus be an utter perversion of the whole doctrine.

This fiction, like all other legal fictions, originated in that watchful anxiety which the law always manifests to establish justice. Yet it would be made to accomplish injustice, if it could bind the legislature against its clear intent, by giving efficacy to its law, as a grant from its first offer, when according to its express terms, it was only to take place in *futuro*, and that on a possible contingency.

We have seen, that the doctrine of abeyance has, even in its appropriate sphere, met with the disfavor of courts of justice in modern times, as *tending to perpetuities*, and as *prejudicing the public*. If in its application to estates of inheritance, it has this obnoxious tendency, how much greater would be its evils, when applied to legislative power? The indelible, constitutional land-mark of legislative power, is, that it shall pass no law impairing the obligation of contracts. Yet this doctrine of abeyance breaks up these constitutional land-marks, by contracting them within much narrower limits. And it says, although you make no contract, yet if you *offer to contract*, you shall make no law rescinding the offer. Can a technical principle of law, work this change in the fundamental law?

We have seen, that abeyance is a doctrine not favored, and which ought not to be extended, as it prejudices the public. Shall we apply it to a class of cases new in their character? To cases of *offered* corporations, when its consequences are such, that it would, manifestly, greatly impair the public interests. The manner in which this injury may be thus inflicted, we have seen in examining the

effects of *relation*, and shall not again advert to them, except to remark, that its establishment in such cases, must infallibly lead to a change in the legislative course which has been adopted since the revolution. The public interest would demand it. For offers of incorporation, although never accepted, would be a negative on the power of making any future, actual grant, in relation to, or interfering with, the offer made.

But it is supposed, that judge *Story*, in the case of the *Dartmouth College vs. Woodward*, 4 *Wheat.* 691, has recognised this doctrine of abeyance, with all its incidents and appendages, as applicable to corporations, such as the one under consideration, and the following language of that learned judge is relied upon for this purpose: "When the corporation is to be brought into existence by some future act of the corporators, the franchises remain in abeyance until such acts are done, and when the corporation is brought into life, the franchises instantly attach to it." If the word *abeyance*, in the above extract, was used in its *technical sense*, it must be admitted, that the authority of the *dictum* goes to the whole extent for which it has been cited; but it is apparent from all the reasoning of that officer, that he used the word "*abeyance*," not in its technical, but in its popular sense, and as synonymous with "*suspension*." Taken in this sense, it is entirely legitimate, and consistent with reason and authority, and that he does mean so to use it, will appear by what follows in the same paragraph of his opinion. He was endeavoring to establish the principle, "that there might be future springing contracts in respect to persons not now in *esse*," or in other words, that the legislature might offer to contract, and that at some future time, when the offer was accepted, it would become an indissoluble contract, clothed with constitutional inviolability: His reasoning, which goes to illustrate his meaning, is as follows: "If the legislature were voluntarily to grant land in fee, to the first child of A, to be born thereafter; as soon as such child should be born, the estate would vest in it.

Would it be contended that such grant, *when it took effect, was revocable*, and not an executed contract upon the *acceptance of the estate*? Take the case of a bank incorporated for a limited period, upon the express condition, that it shall pay out of its corporate funds, a certain sum as the consideration of the charter, and *after the corporation is organized, a payment is duly made of the sum out of the corporate funds*; will it be contended, that there is not a *subsisting contract between the government and the corporation, by the matters thus arising ex post facto, that the charter shall not be revoked during the stipulated period*? Suppose an act, declaring that all persons who should thereafter pay into the public treasury a stipulated sum, should be tenant in common of certain lands belonging to the State, in certain proportions. If a person afterwards born, *pays the stipulated sum into the treasury, is it less a contract with him, than it would be with a person in esse at the time the act passed?*” Now from this quotation from the opinion of the learned judge, it will be perceived, that in every case by him cited, he impliedly admits the legislative power to modify or repeal the proposed grant, or contract, until some right has vested under it, or until something has been done, manifesting the grantee’s consent, and he selects such a period, as the one which places what the legislature have done, beyond recall. This he could not have done, if he meant any thing else by the use of the word “*abeyance*,” than suspension; for had he used it in its technical sense, he could not have so explicitly admitted, that they were liable to recall before they were vested or accepted. Indeed, if he had used the term *abeyance* in its technical sense, they would have been liable to recall or repeal at no time after the enactment; but the offer would have been invested with all the sanctity of an actual grant.

That in the case of grants *to pious uses, or of grants in the nature of a dedication to public uses*, the doctrine of *abeyance* is permitted, does not aid the case of the *Canal Company*. The grant is neither for the one purpose nor

the other. But is a *mere offer to grant* to a joint *stock company*, when it shall be formed, certain privileges, with the right to take tolls, as a source of emolument to the company. Who enjoy the profits of this company? Its emoluments are to be forever secured to the stockholders. But the canal when completed, is declared to be a public highway, it is still, however, subject to the right of exacting tolls for the benefit of the individual corporators, which strips it of the character ascribed to it, that of a dedication to public uses. The preamble of the charter cannot *relieve* it from the difficulty. "Whereas the completion of the work will be of great advantage to the people of this, and the neighboring States, may tend to produce a connected navigation between the eastern and western waters, may extend internal commerce and personal intercourse, between the two great sections of the Union, and may tend to consolidate and perpetuate the vital principles of the Union." These are certainly public objects of great importance. But individuals in the pursuit of private emolument and gain, may accomplish works of great benefit to the public; yet it would be scarcely allowable to say, that they had, therefore, dedicated their services to the public. The same thing may be effected by corporations, and from the same motives, and yet where they are stimulated by tolls to accomplish these results, who would say, that therefore, their franchises were granted as a dedication to public uses? In the year 1810, a bank was incorporated in the town of *Elkton*, with the following preamble: "Whereas it is the opinion of this general assembly, that the agricultural, commercial and manufacturing interests of this State, will be promoted by the establishment of a bank, &c." Now here are great public objects developed, and yet, will it be pretended that the bank thus established, was a dedication to public uses? Yet if the preamble operates this result in the canal charter, it must also do it in the case of the bank. But reasoning upon this subject, is unnecessary. The canal charter is no grant, it is a *mere offer*; and if a case can be found any

where, where rights were decided to be held in abeyance, upon a mere offer, then it will be time enough to enter into a more minute examination of this alleged dedication to public uses.

The case of the *Town of Pawlet vs. Clark*, 9 Cranch, 322, was no offer to grant, but a grant which professed upon the face of it, *to pass from the crown six miles square of land, and all its right and title thereto*; and in *Lade vs. Shepherd*, 2 Strange, 1049, the street was actually laid out and dedicated as a public highway, and in all the cases, where this fiction of abeyance has been applied, the grantor has clearly manifested his intention, to part with his interest in the thing granted. He had not merely *proposed*, or *offered to do so*, but had actually, by apt terms granted it, and the grant would have been prevented from its intended operation, but for the interposition of this principle.

But apart from all the above considerations, this fiction is incapable, in the nature of things, of application to the franchises of a corporation, not in existence. By the franchises of a corporation are meant, those rights which are inseparably incident to it when created, or such rights of eminent domain as the sovereign power may impart to it. The corporation is the *principal*, the franchises are *incidents*. The one is the substance, the other the shadow; the latter cannot be without the former. As well might it be said, that a *court baron* could exist without a *manor*. The corporation, in the case of the *Canal Company* was not to come into existence until a fourth of its stock was subscribed, nor until all the conditions of the charter should have been complied with; as it was not in being, it could have no incident; there could not be any incidents to be in abeyance, when there was no principal. Existing rights may, by law, be placed in abeyance, but non-entities cannot be in that condition. It would require the famed omnipotence of an *English Parliament* to give life to incidents or franchises, and put them in abeyance, before the principal or corporation was created—when the inheritance is in

abeyance, although intangible, it exists. When dignities are in abeyance, the right has in legal contemplation an existence. The doctrine would be perfectly comprehensible, if it could be maintained, that the corporation was itself in abeyance, for then its incidents might also be in the same condition; but when the law passes, it is admitted, that it is not in existence, so that it could be put in abeyance; but it is to spring into life after the law, not by the law itself, but by the conjoint effect of the law, and of acts, *aliunde*. To avoid this difficulty, it is supposed, that after the franchises vest *de facto* by the creation of the corporation, by a kind of legal magic, or subtle metaphysics, there is a coalescence of the legislative act, which creates the corporation and its franchises, with the corporate act, which produces a party capable of taking the benefit of the grant; and that the franchise relates back to the original grant. But it cannot be perceived, that in order to give efficacy to this grant, it is necessary to resort to this ingenious system of reasoning. It must be conceded, that there may be future springing contracts with persons or bodies not in *esse*—is it necessary to give them validity, to say, that they must relate to the first proposition, or offer for the date of their creation? By no means. They take their date from the time of their acceptance; because, until then, it is no contract. 4 *Wheat*. 228. This is the case in ordinary contracts, and must be so in corporations; for charters are compacts between the government and those who assume to act under them. Nor is it necessary to resort to this ingenious refinement, to account for the *modus operandi* of the offered grant. The offer takes date from its acceptance, and the franchises remain in the grantor until such acceptance, at which period of time they are divested by the offered terms of the law, and vested in the corporate body; and thus remaining in the grantor, at all times before the offer is accepted, they are liable to be actually granted to others.

If there be any truth in the above reasoning, neither the doctrines of relation or abeyance, apply to this grant, and

consequently, it must look for the first existence of its powers to the date of its incorporation, which period is to be ascertained, in the words of the law, "when one-fourth of its capital shall have been subscribed," which we have seen never did take place, until the 24th day of May, 1828.

3. It is now proposed to examine the course of *Maryland* legislation, in matters which may affect this company, from the date of her first law in relation to it; and to determine its character and validity, as affecting the rights and interests of the parties to this controversy. In doing this, it may become necessary occasionally to advert to some proceedings under these laws.

On the 28th February, 1827, a charter was offered to the *Rail Road Company*. On the 31st March, 1827, it became incorporated; the quantity of stock demanded by the charter, as preliminary to her incorporation, having been subscribed. Thus, the *Rail Road Company* was an actual incorporated body, nearly eight months before even an effort was made by the *Canal Company* to become incorporated, by obtaining subscribers to one-fourth of her capital; for it was not until the 14th November, 1827, that the latter company made any attempt] to give existence to her charter, and then we have seen, that the attempt was unavailing, the subscribers to the extent demanded by the law, having no authority to subscribe. And a period of nearly fourteen months elapsed, from the time of the incorporation of the rail road, before the *Canal Company* was incorporated; which never took place, as we have seen, until the 24th of May, 1828. Anterior to this period, the *Rail Road Company* was not only incorporated, but had selected the very route in controversy, and had appropriated the greater part of it, by obtaining conveyances for some portions, and agreements for the transfers of other parts, and actually causing locations and surveys to be made. On the 3d of March, 1828, *Maryland*, by a supplement to the act for the promotion of internal improvement, passed the following enactment: "Be it enacted that the treasurer of the *Western*

Shore, be, and he is hereby authorised and directed to subscribe for, and on behalf of the State of *Maryland*, for five thousand shares of stock," with the following proviso: "*Provided, that the said company shall agree so to locate said road, that it shall go to, or strike the Potomac river, at some point between the mouth of Monocacy river and the town of Cumberland, in Alleghany, and that it shall go into Washington, Frederick, and Alleghany counties.*" Which provision we have heretofore seen, the *Rail Road Company* adopted, by causing her route to strike the river *Potomac*, at the *Point of Rocks* above the mouth of the *Monocacy*, and designating her route towards the town of *Cumberland*, on the margin of the *Potomac* river, through the counties of *Washington, Frederick, and Alleghany*. All these laws were enacted, and these proceedings had, before the *Canal Company* was incorporated; and when it was not known, and could not be known, whether she ever would be incorporated. For then it was uncertain, whether the necessary quantity of stock would be taken by valid subscribers, and whether the act of *Maryland* would ever go into operation, by a compliance by the *United States*, with the conditions upon which *Maryland* had made her act dependent, that is authorising *Maryland* to make a lateral canal through the *District of Columbia*, and directing some safe mode by which the right should be secured to her.

Now, if the view already taken be correct, that the company was not incorporated until the 24th May, 1828, and that the *Maryland* law by its express conditions, never became an operative law until the 23d May, 1828; it is undeniably certain, that the grant to the *Rail Road Company*, not only in its general terms, was a valid grant, but would have been equally valid, had the general assembly of *Maryland*, in the charter of the *Rail Road Company* itself, designated the very route in controversy, and that all the acts of the *Rail Road Company* designating and selecting this contested ground, are entitled to protection, as prior vested rights under her grant, which in this view would be ante-

rior to the rights of the *Canal Company*, and therefore entitled to priority and protection. These positions are asserted on the hypothesis, that until the grant of the *Canal Company* was perfected by acceptance, it was always within the competency of the legislature, to repeal or modify her offered charter, or to grant rights and franchises inconsistent with the offered grants, remaining unaccepted, or which may become so in their ordinary and legitimate exercise.

All grants *offered* merely to existing or non-existing bodies, or to persons in *esse* or not *esse*, are liable to be resumed at the will of the *power* or sovereign offering the grant, at any time before acceptance, and to be re granted to other and different individuals. I do not, it is perceived, here speak of those cases where there exists a present intention to grant, and where the instrument purports on its face to be a grant to pious or public uses; and where such instruments are upheld against the general rule of law, that there must be a grantee, as well as a grantor, or a *corpus* to be granted, and which are held an extinguishment of the grantor's right in the thing granted, and constitute exceptions to the general rule, but as will be perceived, of mere *offers to grant*—such offers (and all charters like the canal charter are offers merely,) are not contracts which cannot be violated or impaired by any kind of legislation. Any body of men, therefore, who shall become corporations under such offer, take and accept it, subject to the known power of the legislature, by any act anterior to such acceptance, to modify it, and can only hold it subject to such modification; or if the offer have been repealed, the acceptance is a nullity, and confers no rights. Such is the settled and undoubted law in private contracts, and the reasons which demands its application to grants from the public, are of a much more weighty and imperious character, as we have heretofore seen. That there may be future springing contracts, which do not take effect *instantly*, but grow up, and become binding upon the happening of

some future event or contingency, is not attempted to be denied, or the principle at all impaired. But until that event or contingency does happen, (I speak of cases where no interest has or could vest,) it is insisted, that the proffered contract is liable to a partial or total recall. It could not, for example, be denied, that a grant to the unborn son of A, might at any time before the grant had vested by the birth of the grantee, be entirely abrogated. Nor could it be doubted, that the grant of lands by the legislature to any citizens of the State, who should do certain acts, could be resumed before any citizen had actually entered into a contract with the State, by the performance of the act. It is equally clear, that all the rights proposed to be granted by the canal charter, were liable to the like resumption, at any time before that charter went into legal operation according to its terms. And these rights were all resumed and re-granted by the State; or at least rights and franchises were granted by the State to the *Rail Road Company* of so general and comprehensive a character,—the power to construct a road in any direction, from *Baltimore* to the *Ohio*, that in their rightful exercise they became inconsistent with the offered rights, proposed to be granted to the *Canal Company*. And these rights had actually vested by grant and selection, before the *Canal Company* had come into being, nor would the principle be at all altered, by so construing the offered grant to the *Canal Company*, as to give it a special and designated location along the valley of the *Potomac*, or to make it still stronger, along the left bank of the *Potomac*; for the grant is still, but an offered, unaccepted grant, and the anterior accepted grant to the rail road, being general, broad, and comprehensive, without exception, or limitation, to make a road any where between the designated points mentioned in her charter, clothes her with the right to take any route, not before *actually granted*.

The intention of the legislature, to make this grant to the rail road, without any limitation or reservation of any rights offered to be granted to the *Canal Company*, is not sus-

ceptible of successful contestation. The terms are as comprehensive as our language could make them; the grant is without any express reservation or exception, and without any words from which might be implied, any intention to make any exception. The construction then, admits of no ambiguity, and becomes imperative. We can nowhere look for legislative intention out of the grant, but must confine ourselves in the ascertainment of intention, to the terms used by the contracting parties, in the instrument or charter by which they stipulate. Are we to construe this grant, general in its terms, as if it had contained an express exception of the offered rights, to the *Canal Company*? If it were capable of a double construction, one limited, and the other general, it may be conceded, that we should take that which would be limited, for the purpose of upholding the anterior law. But we cannot give it a construction to produce this effect, because its phraseology is unambiguous, and should, by so doing, limit that which is unlimited, and meant to be so, if language is any just interpreter of intention.

But the legislative intention is manifested if possible, in more direct and specific terms, by the law of 3d March, 1828. By the charter of the *Rail Road Company*, in 1827, she had contracted, as we have seen, in general terms. By her subsequent law, she enters into a new contract with the *Rail Road Company*. She agreed to subscribe for \$500,000 worth of the stock of that company, on condition that the *Rail Road Company* would locate her route, so as to strike the river *Potomac*, above the mouth of the *Monocacy*, and afterwards go through the counties of *Washington*, *Frederick*, and *Alleghany*. This proposition is acceded to; the rail road receives the money; the State becomes stockholders; and the company lay down their road, so as to go to, or strike the *Potomac*, and in pursuance of their contract, locate their road onward, through the counties of *Washington*, *Frederick*, and *Alleghany*, by the margin of the river. Here is a contract, as explicit and as binding as the

original charter, and is in truth a modification, by a subsequent agreement of the original contract; for the grant in the original charter gave an unlimited and undefined range, at the will of the company, to select her route where she pleased; but this new contract restricted her to one designated and particular route; she *must strike* the *Potomac*, and go through *Washington*, *Frederick*, and *Alleghany*. Now, if the *Canal Company* had no route designated in her law, it must be admitted, that so far as this law fixes the route of the rail road, the *Canal Company's* right, however general before the selection, would be gone as to this particular course; and if it was actually located by the law to follow the valley of the *Potomac*, on its left margin, so far as this route interfered with that, it would *pro tanto* be a repeal of the law creating the *Canal Company*. And what was the route to which she was confined by this new contract with the *Rail Road Company*? The rail road must "*strike the Potomac*." Now if this must be done, in the point of contact with the river, there is a direct and unequivocal interference with the route of the canal, and an equally clear interference throughout the whole controverted ground. Can it be believed that the legislature, through mere caprice and frivolity, would order this company to *strike the river*, and then go through the counties of *Washington*, *Frederick*, and *Alleghany*, without meaning that they should then take the margin? For what purpose are they brought to the river, and made to strike it? Was it merely that they might have their hopes of the most eligible route up the margin of the river defeated? Did they mean to invite them there merely to look at the route, then the more cruelly to frustrate their excited expectations; order them to retrace their steps; pass with immense cost and difficulty the elevated ridges of the *Catoctin* mountain, and its parallel ranges in their progress to the western country? Such an imputation, would I am sure, be doing great injustice to the intention of the legislature. Indeed the intention that they should take the margin, is apparent from

the history of the proceedings of the *Rail Road Company*, in evidence in this cause. Engineers had been appointed 20th June, 1827, who proceeded to examine the routes proper for the rail road, and all the routes had been examined (among the rest, this,) before the passage of the law compelling the company to strike the river; for the engineers report, in a month afterwards, this route by the *Potomac*. It is fair to presume, that it was as well known to the legislature, as to the company, that two or more routes were in contemplation. The one by the margin of the river, and the other in a different direction through the three counties. Knowing this, the legislature invite them to the *Potomac*; they must strike it, and go through the counties of *Washington*, *Frederick*, and *Alleghany*. The legislature were anxious that they should not cross the river, but that they should keep on the *Maryland* side the whole way—they must go through the three *Maryland* counties. It is therefore conceived, that the canal charter was modified to the whole extent of the route designated by the *Rail Road Company*, in consequence of the contract made by this law with it. The subscription of \$500,000, by *Maryland* to the *Canal Company*, furnishes no argument against the views which have been taken of the intention of the legislature. If indeed it was contended, that the rail road charter had actually repealed the whole charter of the *Canal Company*, this subscription might well be resorted to, for the purpose of showing, that the State never meant to annihilate it, and of demonstrating her intention, not only, that it should continue to have life and being, but that it should go on and prosper. But no repeal is attempted to be shown; a modification and limitation of its range of choice, is all that is urged, as growing out of the rail road laws. Notwithstanding the limitation thus imposed, she had a right under her charter from *Maryland* and *Virginia*, to have taken the *Virginia* shore of the *Potomac*, from the mouth of *Savage* river to tide, and under the operation of the combined charters from *Maryland* and *Virginia*, she might have pur-

sued the *Virginia* shores, until she arrived at a point opposite the *Monocacy*, or opposite any point which the *Rail Road Company* might select on the *Potomac*, as the point at which she would strike the river, then cross, and take the *Maryland* shore the whole distance to tide water. There is nothing unreasonable in the supposition, that *Maryland* thus intended to limit the *Canal Company*, to the one or the other of these routes, either of which, would have left the company in the possession of her chartered rights, subject to no other limitation, except what had been carved out and granted to the *Rail Road Company*. The canal practicability of either of the above routes is not capable of denial. The *Maryland* side throughout may have been more advantageous, but this will not in the least advance the argument on the other side; the practicability of other routes was foreseen; and all the State says, by her agreement with the *Rail Road Company*, is this, we choose to constitute you a favorite company, by giving you this route; we insist on your striking the *Potomac*; the *Canal Company* has other routes, let her pursue one of them. *Maryland* may have even thought it probable, that she might not materially interfere with the *Canal Company*, and she would not, if that company had fallen upon either of the other routes spoken of. *Pennsylvania* in her act of 9th of February, 1826, looked to this probability, when she demands the consent of *Virginia* to certain provisions of her act, provided the *Chesapeake and Ohio Canal should be located on the south side of the Potomac*. *Maryland* may have done the same; but whether she did or did not, it was sufficient for her to know, that it was perfectly practicable for the canal, to take one of her other routes, and it is apparent by thus interfering with her offered grant to that company, she did mean to throw the *Canal Company* upon such routes.

The assent of the *Potomac Company* did not at all interfere with *Maryland* legislation. Her assent was asked, because the *Maryland* offer of a charter would be in vain, unless she consented to the offer. If she professed a wil-

lingness to waive her rights, then, and not until then, could it have been of any utility to have opened the subscription. But her assent subjected her to no inconvenience, nor bound her to any legal consequence. She could have withdrawn it at any time she pleased, anterior to the vesting of any legal rights. The whole charter was *in fieri* until the conditions which the law demanded, were complied with. And she could, and had a right at any moment before the 23d May, 1828, to have rescinded her assent, for it was not until that period of time, that the charter became valid. The anterior subscriptions on the 14th of November, 1827, were of no consequence, for they were not justified by the charter. It had not become a law, and not being such, they were null and void, and bound no one. The *Potomac Company* was, therefore, in every respect, in *statu quo*, as long as the grants of *Maryland* and *Virginia* stood as offers, and had not become binding, operative grants. She was precisely in the situation of either of these Staets; she could rescind her assent, as they could repeal their laws. It strikes me, that it would be a proposition entirely untenable, to say, that her assent placed her in the same attitude, as if she had actually surrendered her charter. The States had made no contract with the company. She had made none with them, for they had not even a potential existence—nor had she entered into any contract any where, incurred any obligation, forfeited any rights, or done any act, which by possibility could affect her, unless it was her subscription, and that we have seen, was utterly void.

The legislature then, had the power to modify her offered grant to the *Canal Company*, has so modified it, and spoken her intention in this respect, in language too intelligible to be misunderstood, and by such modification and partial resumption, and re-granting of a portion of her eminent domain, has given a perfect right and priority to the *Rail Road Company* in what she demands.

We have been hitherto examining the foundation of the claims of the *Canal Company*, standing alone, on the basis

of *Maryland* law. But the same conclusions result, and the rights of the parties, as ascertained, remain fixed and undisturbed, even although a compact existed between the various grantors of the canal charter. If a compact exists, it is certainly only binding and effectual from the period when such compact was consummated. It cannot ante-date its power to the time when negotiations between the parties commenced, and so derive a capacity to avoid and annul all acts done by the parties, or either of them, in the intermediate time between the first offer by either, and the acceptance of it by all. Each party was bound to know, that neither, by her mere offer, was stripped of her constitutional powers of legislation, and if she accepted such offer after legislative interferences, she must necessarily make her acceptance subject to all resulting consequences, and all intermediate grants. If this be true, (and it is not perceived how it can be denied,) and if it be also true, as has been attempted to be shown, that the conditions imposed by *Virginia* and *Maryland*, were never, in their letter or spirit complied with until the 23d of May, 1828, then it follows, *ex consequenti*, that the compact, if any, was never until that day formed by the contracting parties; and *Maryland* having in the mean time, granted certain rights and franchises to the rail road, which had become vested and valid contracts, such compact, when formed, was necessarily subject to the due and legal operation of such grant and contract; and became obligatory in every other respect according to its terms.

Whether *Maryland*, in this intermediate grant, acted in perfect good faith, might not perhaps be the subject of judicial inquiry. But in this, as in all other portions of her political history, her character stands unblemished, and is susceptible of entire vindication, even considering the grant in the light of a compact, and her first offer as intended to bring about mutual and binding stipulations. Her first law was passed on the 31st January, 1825, and her conditions were never complied with, until 23d May, 1828,—a period

of three years and four months. In the mean time we find her complaining of the inefficient character of the first act of *Congress*, and in effect demanding the just and entire fulfilment of her conditions, by her law of 6th March, 1826, entitled, an act for the promotion of internal improvements; and even after this, upwards of two years are suffered to expire, before the *United States* complies. In the mean time, all efforts to organize the company, legitimately, had failed, and she herself had, by her law of December session, 1827, entitled, "a further supplement to the act entitled, an act for the promotion of internal improvement," expressed her doubts, whether the work would ever commence. Indeed it must be admitted, that the whole work was entirely contingent on the possible subscription by the *United States* of \$1,000,000. And when the uncertainty of such an event was looked to, it must have been doubted by all, even the most sanguine, whether it ever could progress. Under such discouraging circumstances, from the combined causes above adverted to, can it be said that there could be any breach of faith in the State undertaking to make her grants to the *Rail Road Company*, as she has done, and of interfering with her previous offer to the extent which she did do by that grant? How long was she to wait for the fulfilment of her conditions? She had in effect twice reiterated to *Congress*, the necessity of complying with her conditions by the act of 1826, above adverted to, and by a further supplement to the same law, passed the next year; a deaf ear was turned to these solicitations, and the case of the *Canal Company* was utterly hopeless. She was not bound to wait for ever, and a just respect for the rights and interests of her people, demanded of her, that she should not longer be restrained in the march of improvement. She had waited as long as reason and propriety demanded, and nothing further could be sought by the most scrupulous adherent of good faith.

If it be urged, that the relations of *Maryland* with the *Potomac Company* should have prevented her modifying

the canal charter, the answer is in substance found in the previous part of these views. Her complaint against *Maryland* would probably be, that she had assented, and that she had become a subscriber to the stock of this company, and that she ought to have been in good faith consulted. But such a complaint would obviously have no just foundation. She assented to the law, as *Maryland* made her offer. Her assent was not binding; it could at any time have been withdrawn, and such being the law, it will be intended that the parties so understood these transactions. There was nothing therefore, to prevent her, after the enactment of the rail road charter, from withdrawing her approbation; and not having done so, it is fair to consider her as yielding to any modification which *Maryland* had made in the canal charter; at all events, after the modification her assent, became subject to it. As to the subscriptions of the *Potomac Company*, they were utterly void, there being at that time no law to justify them, and of course the *Potomac Company* was under no obligations.

The above views of the whole case would entirely relieve me from the necessity of examining the question, whether any compact did, at all, exist between the State of *Virginia*, *Maryland*, the *United States*, and the *Potomac Company*, in relation to the *Canal Company*. But I will proceed to present my views upon that subject.

1. Was there any compact between the States of *Maryland* and *Virginia*, in relation to the *Potomac Company*.

2. Was there any compact between the *United States*, *Virginia*, *Maryland*, and the *Potomac Company*, in the formation of the charter of the *Canal Company*.

In the exposition of grants, as we have seen, the grant itself is the only index of the thing granted, and that matters *aliunde* cannot be resorted to, for the purpose of limiting or enlarging the express terms of the grant. But where the enactment of two States is resorted to, for the purpose, not of showing an express compact, but of raising one by implication, a resort to some matters *aliunde*, may be gov-

erned by different considerations. In such case, the supposed compact rests only on inference and intendment, and the acts, usage and practice of the States, it may not be unfair to bring into review, to show the character which the parties meant to impress upon their laws. With these remarks the above questions will be separately examined.

1. Was there any compact between the States of *Maryland* and *Virginia*, in relation to the *Potomac Company*.

Anterior to the passage of the laws by which the *Potomac Company* was chartered, conferees, as we have heretofore seen, were appointed by the legislatures of the respective States, for the purpose of inquiring into the proper mode of improving the navigation of the *Potomac* river. This conference resulted, *not in any compact*, nor in any recommendations *that any compact should be formed* by the States, but merely in recommendations that a *similar law should be passed by each State* to establish a company for opening the river, and similar laws of incorporation were passed by each State, chartering the *Potomac Company*, for the purpose of promoting an object no doubt greatly beneficial to both. The law of *Virginia* does not appear to have been of a dependent character, but the charter of *Maryland* rested on the condition, not that *Virginia* should enter into any agreement with her in relation thereto, but that she would pass a similar law, granting the same company the like privileges, and authorised a subscription for fifty shares of its stock, on condition that *Virginia* would subscribe the same. With these exceptions the charters of the two States were identical.

Besides the provision above adverted to, as contained in the *Maryland* law, each charter contained the two following sections, which are the only ones which have any relation to this subject :

“SEC. 10. *And be it enacted*, That the said river, and the works to be erected thereon in virtue of this act, when completed, shall forever thereafter be esteemed and taken to be navigable as a public highway, free for the transportation of

all goods, commodities or produce whatsoever, on payment of the tolls imposed by this act; and no other toll or tax whatsoever, for the use of the water of the said river, and the works thereon erected, shall at any time hereafter, be imposed by both, or either of the said States; subject, nevertheless, to such regulations as the legislatures of the said States may concur in, to prevent the importation of prohibited goods, or to prevent fraud in evading the payment of duties imposed in both, or either of the said States, on goods imported into either of them.

“SEC. 19. *And be it enacted*, That all commodities of the produce of either of the said States, or of the western country, which may be carried or transported through the said locks, canals, and river, may be landed, sold, or otherwise disposed of, free from any other duties, impositions, regulations, or restrictions of any kind, than the like commodities of the produce of the State in which the same may happen to be so landed, sold, shipped, or disposed of.”

By these references to the charters, it is insisted by the appellant, that a compact grows out of one, or all of the following circumstances.

1. The dependent character of the *Maryland* charter.
2. That the river and canals were declared highways.
3. The prohibition on both States to impose the tolls.
4. The concurrent character of all laws to be passed, to prevent the evasion of the revenue laws of the respective States.
5. The exemption of all produce from any tax, other than what is imposed on the like produce, by the State where it shall be sold or shipped.

1. From the dependent character of the *Maryland* law, it must be obvious, that no idea of a compact can arise. A State may affix any condition to her law, which she may think proper, however arbitrary, or seemingly destitute of reason it may be, as to make any law affecting the rights of her citizens, dependent upon a law of a similar character being passed by a foreign State, operating upon her citizens,

as a trespass law—a law regulating replevins, or any other law; yet who could say that if such foreign State complied with the condition, that there would exist an irrevocable, or any other contract between the two States, neither to repeal their law without the consent of the other? Whether the condition arises from caprice, or from high motives of interest or state policy, cannot alter the question.

Maryland had in truth high objects to gratify, by her enactment that her law should be inoperative, till *Virginia* passed a similar law. The *Potomac* river was a border stream; each State had great interest in the improvement of its navigation. She proposed to establish a company, and also to aid it with her funds; but why should she do this unless *Virginia* would do the same? Why should she exhaust her resources, if *Virginia* would not lend a helping hand. She therefore chose to make her charter dependent. Her objects by doing so were, as she anticipated, all accomplished. *Virginia* was by this dependent system of legislation, stimulated to grant a charter, and also to subscribe her funds. These were the sole motives and objects of the legislature, in pursuing this peculiar course and manner of legislation.

Before proceeding to the examination of the other clauses in the charter, which have been relied upon, as creating a compact, it may be assumed, that a court of justice would in no case be justified in deducing inferentially, a contract, or compact, between sovereign States, from their mutual enactments, unless the existence of such compact would be necessary to give efficacy to their laws, and this assumption is founded on a reason so obvious, as that it need only be stated, to receive assent. By making concurrent laws, compacts, the sovereign power of the States would, most generally, be restrained in their accustomed power of legislation, over the subject matter of such laws, for in every case, each would be obliged to seek the assent of the other, to make valid any repeal or amendments. Such consequences ought therefore only to flow from clear expressions, and

unequivocal indications of intention. Now when we are able distinctly to ascertain, that no motive could exist for a compact producing such results, and that the whole object which each State had in view, was effectually brought about without supposing such a compact, by a separate course of legislation, unfettered by any State agreement, there is no ground left for the inference of an intention to make an agreement. With these views, let us ascertain whether those clauses, which are considered as compacts, are not as effectually secured to the States without, as with a compact, and by the separate laws which they have enacted.

2, 3, 5. *The charters declare that the river and canals shall be highways.* The object of this provision was effectually established by the creation of a charter to the company in each State, and could never thereafter be violated, either by the company, or by the company and one of the States combined, or by both States acting together, without the consent of the company, or by either State acting separately, and alone. The company could not violate it, because such a course would violate her charter. Neither State acting separately, nor both acting together, could violate it, because it would be in breach of their respective grants to the company; nor could one of the States, acting with the assent of the company, repeal this provision of the charter, because it would be in direct violation of the charter granted by the other to the company, and would work a forfeiture of the grant in that State; and such a consequence, from the very character of the work, would utterly destroy the value of the subsisting charter; and would just as effectually guard one of the States, against such an injurious combination between the other State and the company, as any compact could possibly do. The same course of reasoning applies to the prohibition on each State, to impose other tolls, and to the clause exempting all produce from any tax other than what is imposed on the like produce, by the State where it shall be sold or shipped.

4. No deduction favorable to the idea of a compact, can justifiably be drawn from that clause, in each charter, which demands concurrent legislation, in all laws passed to prevent the evasion of the revenue laws of the respective States. Each State agrees with the company, that it will pass no such law by force of its own legislation, but that it shall at all times, be contingent upon the concurrence of the other. This is the contract with the company, for its security. And can it be doubted but that she has a perfect capacity to make such a contract, and that she never could violate it, if there was no compact?

A fact in the history of these States will be adverted to, for the purpose of showing the entire improbability, that in the grants to this company, any compact was ever contemplated by the States to be made with each other. At the very sessions of the legislatures of *Maryland* and *Virginia*, at which these charters were passed, commissioners of these States were holding their sessions at *Mount Vernon*, negotiating a compact in relation to the navigation of this river. It was concluded in March, 1785, and in March, 1786, it was formally ratified as an irrevocable compact between the two States. Two of the articles are, that the river should forever be a highway for the commerce of the two States, and that all laws creating any obstructions, in, or to, the navigation of the river, were prohibited to each State, without the consent of the other. No clause in it, is found having relation to the *Potomac Company*, or to any previous compact having ever existed between them in relation to this subject, although they were engaged in making agreements in relation to the very subject to which the *Potomac Company* applied. If the charters were compacts, it is astonishing they should not have been adverted to in any way; and if they were compacts, it is not to be credited, that they would in the short space of three months, have again negotiated about the subject of making the river a highway, and should have shortly after ratified that compact, when they had but just previously made one in relation to the very

subject. The truth is, the States never dreamed that in chartering the *Potomac Company*, they had made any compact. This idea has been a modern discovery by the appellants.

This is clearly proved by their practice. Emendation after emendation has been made by the respective States, in the charter of this company, in great and important particulars, without asking the consent of the other. Is it probable this would have been done, had the assemblies of the States, or the company, believed, or thought, that any agreement had been made between the States, in relation to the subject?

2. Has any compact been formed between the *United States*, the States of *Virginia* and *Maryland*, and the *Potomac Company*? This compact between the States is supposed to grow out of the following provisions.

1. The extra-territorial character of the legislation.
2. Its dependent character.
3. That the canal shall be a highway, &c.
4. That water rights are reserved to the respective States.

5. That each State has reserved the right to make a lateral canal in the *District of Columbia*.

1. The extra-territorial character of the laws. This can have no bearing on the question. *Virginia* could not legislate for *Maryland* or its territory, and certainly did not mean to do so, even with the consent of *Maryland*. She must have contemplated the entire re-enactment of her law in *Maryland*, to give it efficacy, and her wishes, in this respect, were carried into effect. It was foreseen, that the object to be created by her law, might at one time occupy her own territory, and again the territory of her neighbor, and would lie along the borders of each, hence this law assumed this character. She too, passed the first law, and it properly assumed the shape of one perfect and entire grant, as a fundamental law for the company, which, when by a re-enactment in the several States, it became a valid

law, all might appeal to it where it could be seen at one view, instead of being obliged to look for disjointed fragments of the grant, in the statute books of four States.

2. *The dependent character of the laws chartering the Canal Company.* Most of the reasons urged for the shape which the *Potomac* charter assumed, in this respect, will apply to the one now under consideration. But in addition to the fact of the canal running into both States, and so requiring legislation on the part of *Maryland*, to give full efficacy to all the objects and views of *Virginia*, neither *Virginia*, *Maryland*, nor the *United States*, could have acted in this matter for their own peculiar territories, without obtaining the assent of the other. Their anterior history shows, they had lost all absolute powers of legislation in relation to the river, and could only again resume them, with the consent of the other. A reference to the compact between *Virginia* and *Maryland*, agreed upon in 1785, and finally settled in 1786, will show that it had been stipulated, that the river was forever to be a common highway for the citizens of those States, that neither State could obstruct, in any manner its navigation, and that all laws to be enacted by either, upon this subject, were to be invalid, unless assented to by the other. This ancient compact, satisfactorily accounts for *Virginia* demanding the assent of the two other powers, even if her law had been entirely in its form extra-territorial. For she was enacting a law, the consequence of which, in abstracting so large a quantity of water from the bed of the river, might in dry, nay in ordinary seasons, have had a tendency, by rendering the river less navigable, to have materially interfered with its value, as a public highway for the commerce of the two States, and interfered with the spirit of that agreement, which prohibited either State from obstructing the navigation of the river. The same considerations which induced the demand of the assent of *Maryland*, occasioned the same requisition on the *United States*, and the *Potomac Company*. The former had, by the session of the *District*, succeeded to all the rights of *Maryland* on the left

bank of the river, so far as the same was within her territory, whether those rights grew out of the territorial sovereignty of *Maryland*, or by treaties, or compacts with other States: and the *Potomac Company's* assent was also necessary to be asked, before the *Virginia* law could be operative, for the grant to her gave her rights over the river, and preferences in its navigation, which the new law materially interfered with. The demand of this "assent" on the part of *Virginia*, is then put upon the sound and proper principles, when it is placed on the combined facts, that the canal might be extra-territorial, and that consent to any legislation was a direct compliance with anterior stipulations; *Maryland* and the *United States* yield their consent. The form in which this has been done, has been seized upon by the solicitors for the appellant, as indicating a contract by appropriate terms. *Maryland* spreads on her statute book, the whole *Virginia* charter, and then declares that it is "*accepted, ratified, and confirmed.*" The *United States* refer to the act, and say "*it is ratified and confirmed so far as to enable the company to make their canal in the District.*" Now if it has been shown, that *Virginia*, by her proposition never meant to make the offer of a contract, but merely to ask consent, as she was bound to do, to give efficacy to her law; then it is immaterial what were the intentions of *Maryland*, and the *United States*; they could not by any terms, make that a contract, which was never, by the State offering, intended to be such. There must, in every contract, be an *aggregatio mentium*—both must agree to contract, or there can be no contract; and here I might permit this branch of the subject to rest; but neither *Maryland* nor the *United States* believed they were entering into any compact, instead of re-enacting the whole *Virginia* law, section by section, and causing it to appear as an ordinary statute, as was done by the States in the organization of the *Potomac Company*, they ratify, confirm and accept the *Virginia* law, as their law. A difference is only created in the mode of legislation, none in its consequences. It is

still a *Maryland* law; and as far as the *United States* and *Virginia*, or the *Potomac Company* were concerned, was liable like all her other statutes, to repeal, or modification, until the grant proposed to be made, had actually sprung into a contract, by the organization and acceptance of the company proposed to be created.

3. *That the canal to be constructed shall be a common highway, and no other toll shall be imposed, &c.* This branch of the subject has been fully examined, when inquiring into the character of the grant to the *Potomac Company*, and having shown that it constituted no compact, no further observation need be made in relation to it.

And 5. *That water rights are reserved to the respective States for the canal, both in the States of Maryland, Virginia, and the District of Columbia.* These reservations are so clearly restrictive of the general grant to the company, and a maintenance of the power of each State over the subject matter of the grant, that it is difficult to perceive how a compact is created; they are but conditions annexed to the grant, which run with it. Liberties reserved out of the grant, which the grantor could not defeat, nor could either State; for such attempted defeat would work a forfeiture of the grant, and neither State could do any act, or exercise any power, which would annul an actually vested grant. We have heretofore seen, that every judicial tribunal is impelled by the highest considerations, not to make a compact of acts which are entirely susceptible of accomplishment without, nor to call in the aid of a compact, unless there is (if I may be permitted to use the phrase,) a "*dignus vindice nodus*." The right of the States to tap this canal, any and every where, according to the charter, will forever exist without a compact, in virtue of the mere grant. For, let us suppose that one State attempts to interfere, to prevent the other from making a lateral canal, is not the whole charter forfeited in such other State? Certainly; for it is the condition of the grant, that this liberty shall exist, and the very fact that a forfeiture would thus

take place, secures the observance of this branch of the charter. But a State could not thus act, for it would be a violation of the grant to the company: she adopts and sanctions her grant, seeing and knowing all the conditions and reservations attached to it, and by thus sanctioning it, all the conditions are adopted, and the company could hold such State to a strict compliance with them.

Instead of there being any just foundation for the supposition of a compact, the inferences are all the other way.

These States were never known to leave their compacts, to inference from equivocal acts, but frame them with the precision which all governments do, when they enter into solemn treaties or compacts with each other. Is such the habit of the *United States*? Look at her compact with *Georgia* for the cession of her western lands. Look at all her compacts with the new States, when admitted into the Union, in relation to the public domain, within the limits of such new State. Every thing is framed with certainty and precision, and the only doubt which could possibly arise would be, not whether a contract existed, but perhaps on the construction of the contract. What has been the course of *Maryland* and *Virginia*? The only instance in which they ever framed a compact, we find that it was regularly negotiated by commissioners, and formally sanctioned by legislative enactments. It is not intended to be asserted, that these governments might not have made a pact, by a less solemn mode of proceeding; but their practice is resorted to, to rebut the inference of a contract in this case.

Their legislation too, in this particular instance, one would suppose, was guarded with some caution, for the very purpose of avoiding the possibility, that a compact should be supposed to exist. If *Virginia* had supposed she was about entering into a contract with *Maryland*, she would have contented herself with a simple, unqualified, demand of assent, which as the legislature of the nation, *Congress* was empowered by the constitution to give. But she evidently

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never looked to this kind of assent. She says expressly, "*I only want your assent in virtue of your authority to legislate over the District.*" *Virginia* looked to the local and peculiar powers of *Congress*, as a mere territorial legislature, and not to her great constitutional powers, to overlook and guard agreements made by the sovereign States of the Union, with each other. If such was not the object of the provision, what was expected to be obtained by it? Why thus limit her assent? Her assent in the form in which it was asked, was indispensably necessary, as we have seen, not only to gratify her objects in granting the charter, but in the fulfilment of her obligations, and it was not necessary to go beyond this, as she contemplated no compact, to which her general constitutional power of assent was necessary, thereby leaving nothing to inference, but clearly demonstrating that she proposed nothing else, than separate legislation on the part of each government; making the offered grant dependent only on similar grants, by other powers. But it is said by the appellants' solicitors, *ex cathedra*, that this peculiar phraseology of the *Virginia* law, grew out of a desire on the part of that State, to exclude the conclusion, that by asking the consent of *Congress* in general terms, she would admit the powers of that body, constitutionally to legislate on subjects of internal improvement. If this were indeed her intention, there must have been an extraordinary portion of metaphysical subtlety engaged in the structure of her law; for who could ever dream, that a State in asking the assent of *Congress* to a compact between States, by the most distant implication, admitted the existence of power in *Congress*, to legislate over the subject matter of the compact? But the ascription of such intention to her, does not in the least degree, prove, it was the desire of *Virginia* to have the consent of *Congress* to a compact, but she asks it, that by virtue of legislation on the part of *Congress*, the canal might be extended through the *District*, by a similar grant to the same company, and that thereby the objects of her grant might be effectuated.

Again, is no inference to be drawn against the idea of a compact, from the fact, that no visitorial power has been created over this corporation? Is it to be conceived that sovereigns entering into a contract, to give birth to a perpetual corporation, would have provided no common tribunal to guard the sanctity of its grant; or who might be enabled, when the corporation was transcending its limits, or from mis-user or non-user, had failed to gratify the objects of those who gave it life, to restore to them the re-possession of their imparted sovereignty? Yet, here is a corporation without a visitor. They could not have left this matter to future stipulation; and it is unreasonable to suppose, that so grave and important a matter, had escaped the observation of the contracting parties. There being no provision on this subject, it is not unfair to conclude, that the States never thought of a compact, but looking solely to their acts, as separate grants of independent sovereignties, its legal supervision was supposed to be where that of every other corporation is, in the courts of the State creating it.

But who is it that complains of this violation of compact? If there be a compact, it must be admitted that it is with parties always vigilant of their rights, and ever ready to maintain them. Has the history of the country furnished us with any evidence of remonstrances on the part of *Virginia*, or the *United States*, of an infraction of her contract by *Maryland*? Not a murmur has been heard; on the contrary, the *Rail Road Company* have grants, from both *Virginia*, and the *United States*. Is no deduction to be made from this, of what were the intentions of the governments? Is not the inference satisfactory, that they never supposed any compact had been made to be violated, and that *Maryland* had done nothing, except what she had a right to do.

Having thus shown, that the *Chesapeake and Ohio Canal Company* had no derivative rights, which over-reached the *Ohio Rail Road Company*, acquired from the *Potomac*

Company, and that the *Rail Road Company* has in the adoption of her route, done nothing which could interfere with the rights of that company if it were yet in being, and consequently with the right of the *Chesapeake and Ohio Canal Company* derived by assignment from it.

Having shown, that the *Chesapeake and Ohio Canal Company* could only date its charter from the 23d May, 1828, when *Congress* complied with the provisions and conditions upon which the States had made their charter legislation to depend, and that it must date its incorporation from the day when the subscriptions of the corporations of the *District* were confirmed by *Congress*, both of which periods were subsequent to the charter of the rail road, and its adoption of a route.

Having shown, that the *Rail Road Company* could not be over-reached by any supposed relation or abeyance of the rights of the *Canal Company*, and that there existed nothing to prevent the State of *Maryland*, at any period anterior to the vesting of any rights under her offer of a grant to the *Canal Company*, from either repealing it in *toto*, or modifying it, whether its charter be considered either as the offering of *Maryland* law, or growing out of her concurrent legislation with other States.

Having shown, that the State of *Maryland* has restricted the *Canal Company* in her choice of her route, and fixed the route of the *Rail Road Company* therein, that the law is constitutional, and gives the latter company a priority.

And finally, having shown that there exists no compact between *Maryland* and *Virginia*, in relation to the *Potomac Company*, or between the *United States*, *Virginia*, *Maryland*, and the *Potomac Company*, in the creation of the *Canal Company*, which could prevent the legislation of *Maryland*, or interfere with the rights of the *Rail Road Company*, acquired under such legislation.

I shall proceed in conclusion, to make some observations on the comparative equities of the respective parties.

It is objected against the equity of the complainants, that they hastily fastened themselves upon their route on the left bank of the *Potomac*, during a period of time when the *Canal Company* was unable, from a want of organization, to select that route, and their conduct in this respect, has been assimilated to one who takes advantage of the inability, or minority of a *feme covert* or infant, by seizing upon, and appropriating their property ; and it is emphatically asked, whether equity in such a case would not interfere ?

But it is not perceived, that this haste emanated from a desire to oust the canal of its rights or privileges, but to appropriate that which she believed she had a right to occupy; and if she had the right to occupy it, it would be difficult to impute to it, the want of equity in its proceedings, in endeavoring to gain possession of the right, whatever knowledge she might have of the movements of her antagonist. But let us trace the history of this matter a little farther, and its developments will show the futility of the argument. On the 7th December, 1826, *General Bernard* had reported to *Congress*, that the proposed canal would cost 22,000,000 of dollars. *Maryland*, at the session of its legislature of that year, had expressed her doubts, whether the canal would ever go into operation. *Maryland* had made her subscription to depend on the subscription by *Congress*, of a million of dollars, and it must be admitted that when the magnitude of its cost was taken into consideration, together with the uncertainty that *Congress* would ever give her aid, that the circumstances which surrounded the proposed corporation, were such as to make the most sanguine doubt of its success. In this state of things, the project of a rail road was started, as one the most likely to accomplish the object in view; and the history of all the legislation in relation to it, as well as all its proceedings from its organization, manifest that there was no tardiness or delay at any time. The same expedition existed in the commencement of the undertaking, as at the period when the conduct of the company is considered so objectionable. A brief

reference to these laws and proceedings, will show the activity of all concerned, and at a period too, when that company could have anticipated no collision with the *Canal Company*. On the 28th February, 1827, the rail road was incorporated by *Maryland*. On the 8th March, 1827, it was incorporated by *Virginia*. On the 31st March, 1827, the whole amount of stock was subscribed. On the 23d April, 1827, the company was organized. On the 20th June, 1827, engineers commenced their surveys to the *Ohio* from *Baltimore*. On the 5th April, 1828, the engineers report the route by the *Potomac*. On the 5th May, the board of engineers adopt the above report. On the 9th May, 1828, advice of counsel is asked, as to the mode of acquiring title to the adopted route. On the 12th May, 1828, the board of engineers were directed to proceed on the adopted route, preparatory to construction; and on the 14th May, 1828, agents were despatched to obtain title to the adopted route.

Thus, we perceive that this company moved with celerity from the very beginning. Even at a period of time when no one would have dreamed of any collision, only ten days was suffered to elapse after the passage of the *Maryland* charter, before one was also procured from *Virginia*, and in less than six weeks thereafter, notices had been given of the meetings of commissioners to take stock. The stock had been subscribed, and the company duly organised. No greater expedition was used afterwards than before. If there had been any alteration in the conduct of the company, if from being dilatory, it had become active and energetic, there would have been greater force in the argument. But where its character has been marked with energy and dispatch throughout, it would be difficult to impute that dispatch at any given period to inequitable motives, when, at one period at least, it would have been impossible to ascribe such considerations to the same actions.

But this conduct of the *Rail Road Company* is susceptible of other views, which make the course they pursued entirely justifiable, On the 3d of March, 1828, *Maryland*

had subscribed \$500,000 to the company, on the condition that she would go to the *Potomac*—or in other words, the State, as we have seen, not only gave her liberty to take that course, but invited it by the strongest considerations, and having thus manifested her wishes, and conditionally fixed her route, could there be a want of equity in pursuing that course, and appropriating it to herself? Her creator, and that of the *Canal Company*, the fountain of law and justice within the territories of *Maryland*, its legislature, had invited it to this course, and in obeying so high a manifestation of the public will, the charge of inequity against her, would seem to be entirely destitute of any just foundation.

But let us look at the picture on the other side, and we shall find that imputations of a want of equity are made upon much more solid foundations. While the charter of the *Canal Company* was yet *in fieri*, its stock, as we have seen, not subscribed for within its charter, and of course its route not designated, the State of *Maryland*, by a supplement to the very law, subscribing \$500,000 to the *Canal Company*, subscribed the same sum to the *Rail Road Company*, on condition that she went to the *Potomac* river, and through the counties of *Washington, Frederick and Alleghany*. Notwithstanding this appropriation of the *Potomac* route by the legislature of *Maryland* to the *Rail Road Company*, the *Canal Company* take the subscription of *Maryland*, and still insist upon having the very route, thus otherwise appropriated, under the supplement of the law, which gives her the money. Had the *Canal Company* acted with perfect good faith to the State of *Maryland*, after taking her money, she ought to have considered herself, whatever were her absolute rights, as having waived her right to take that course which *Maryland* had appropriated to the *Rail Road Company*. It is true, *Maryland* had in fact only assumed the character of a stockholder in both these companies; but it is impossible to lose sight of the idea, that she never looked to her own emoluments as a stockholder, in

making these subscriptions, but acted the part of a generous patron to those works, both of which she was, no doubt, anxious to see accomplished, and that for this purpose she generously and liberally advanced the public funds. Was it just and equitable therefore, in the *Canal Company* accepting this bounty, thus munificently bestowed, with full notice of the wishes and views of her creator and benefactor, to frustrate and defeat the only object the State had in view in extending her aid to the rival company, by declaring that she would have the very route, upon the selection of which alone the State had declared, she would bestow her bounty on the *Rail Road Company*? Her course was too plain to admit of hesitation. She ought either to have refunded the money, or have abandoned the route.

Before closing this opinion, I beg leave to subjoin a few remarks in relation to the derivative rights of this company, which were neglected to be made under the appropriate head.

If the *Canal Company*, as the assignee of the *Potomac Company*, still possesses the power of condemnation, it is not a power in aid of the *Chesapeake and Ohio Canal*, but in furtherance of the objects of the *Potomac Company*. If land is condemned under her powers, derived as assignee, these lands must be applied to the objects designed by the charter of the *Potomac Company*, and not to the objects designed by the *Canal Company*. In other words, she has no right to condemn under one charter, for the benefit of the other. Now the *Canal Company* have adopted the left margin of the *Potomac* for the canal, and can have authority to condemn for such a purpose, under that charter, and for that only. As long as she adheres to her route, her rights of condemnation, under her *Potomac* charter, are gone. So far from intimating a desire to abandon such route, she is insisting upon it here. It is clear, that all her condemnations must be made under her canal charter, or they cannot subserve her purposes; for she cannot use them for her canal, if they are condemned under the *Potomac Company's* char-

ter. She presents herself to the court in the attitude of an entire abandonment of the *Potomac* charter—Why? Because she has adopted the route of one continuous canal from tide to the mouth of *Savage* river, *under her new charter*, and so far at least as the left bank of the river is concerned, looks entirely to the new, and not to the old *Potomac* charter. If she means to exercise rights under the *Potomac* charter, they must now be in the bed of the river or on the *Virginia* shore. In this point of view, her rights from the assignment, would be of no consequence to her in this controversy.

From all these views, it appears to me, that in point of law and equity, the *Rail Road Company* is entitled to the route she has selected, and I am therefore for affirming the decree of the Chancellor.

DORSEY, J., also dissented, and delivered the following opinion :

In forming an opinion on the various questions presented for determination, by the argument in this case, I shall endeavor to divest my mind of every impression, which may have been made by the eloquent and forcible appeal, preferred to the patriotism and sympathies of this court, by the appellant, to induce them to urge on the argument of this case against the consent of the appellees, out of its regular order. And this, I am the more easily enabled to do, by finding, on a careful examination of the record, that the harsh and uncharitable remarks made on the conduct of the *President and Directors of the Baltimore and Ohio Rail Road Company*, according to my view of the subject, are wholly unwarranted by any unprejudiced consideration of the facts in the case; and that the appeal made to stimulate the patriotic energies of the court, to an unwonted expedition, for the avowed purpose of removing the alleged “only obstacle” to the speedy completion of the greatest of national objects, the consolidation and perpetuation of the vital principles of the Union, and

the establishment of a connected navigation between the eastern and western waters, cannot be followed by the contemplated result; as the counsel for the *Canal Company*, in his concluding argument, has distinctly announced to us, that this company has not been chartered by *Pennsylvania*; not having agreed to accept the act of assembly of that State, by reason of the numerous conditions on which it was granted. That under present circumstances, more favorable terms could be obtained by them, is an event, in my estimation, not to be anticipated. So that this magnificent and stupendous enterprise is disrobed of its national character, and consequently, high prerogatives, and sinks into a mere "local" canal, whose extension is limited by the confines of *Maryland*. I shall also view this case, unprejudiced by the assertion, that the canal being a public highway, its charter should be most liberally and favorably construed; whereas, that of the rail road establishing "a close," "odious," and "enormous monopoly," should be visited with a most rigorous interpretation. Because, I regard a rail road, practically and beneficially, as great a convenience to the community, as any public highway; and those features of monopoly, so much complained of, are the inseparable attributes of that mode of internal improvement, deprived of which, it would lose all its value, and could no longer be esteemed as of public utility.

The first inquiry, which I shall examine, is that, most elaborately and ably discussed on both sides: at what time did the rights of the *Chesapeake and Ohio Canal Company* accrue? Are they to relate to the date of their charter, or to the period at which, by the terms of that charter, they became a body corporate? As to the *Rail Road Company*, in this respect, there has been no controversy. Whether the accrual of their franchises be carried back to the time of the adoption of their charter, or to the time of their organization under it, is immaterial, as far as this first inquiry is concerned. The time, at which they assumed their corporate charter, were duly organized, and made the location

of their rail road, being conceded. With respect to the *Chesapeake and Ohio Canal Company*, a preliminary question is presented: at what time, agreeably to the provisions of their charter, was the amount of stock subscribed for, requisite to give them a corporate existence? By the 3d section of that law, it is enacted, "that whenever one-fourth, or a greater part of the said stock, shall have been subscribed, in the manner aforesaid, then the subscribers, their heirs and assigns, shall be, and are hereby declared to be, incorporated into a company, by the name of the "*Chesapeake and Ohio Canal Company*." The object of the legislature, in imposing this condition precedent, to my mind is most manifest; they designed that the powers and privileges created by their charter, never should vest, until the number of subscribers was such, as to afford a guaranty, or strong probability of the completion of the work, of which the company were to assume the execution. Nothing but a subscription by *bona fide*, competent subscribers, could gratify this postulate of the canal charter. If for a proposition, so undeniable, an authority were required, one, of the most conclusive character, may be found, in the case of the *Salem Mill Dam Corporation vs. Joseph Ropes*, 9 *Pickering*, 189.

One-fourth part of the capital stock of the *Chesapeake and Ohio Canal Company*, is \$1,500,000. In November, 1827, the whole amount of subscription, for the canal stock, by competent subscribers, was \$416,900. In January, 1828, it was \$562,700. In these estimates are excluded the subscriptions of \$100,000 by the corporation of the city of *Washington*; of \$250,000 by the corporation of *Georgetown*; and the like sum by the corporation of *Alexandria*; because, by reference to the charters of those cities, it will be seen, that they were incompetent to make such subscriptions: their powers being all of a strictly limited, municipal character; and by no possibility of construction, could they be made to convey an authority to bind those cities for the amounts which had been subscribed. They

could levy money on the property within their respective jurisdictions, only to a very small amount; and such levies, they were enjoined, to apply to defraying the expenditures, incident to the execution of the specially enumerated powers with which they were invested by their charters. The subscriptions of stock, by the corporations of *Georgetown*, *Washington* and *Alexandria*, as before stated, formed therefore, no part of that subscription, which was required by the charter of the *Chesapeake and Ohio Canal Company*, to give that company a legal entity. And, that such was the admitted fact, anterior to the present controversy, is demonstrated by the act of the *Congress* of the *United States*, passed May 24th, 1828, entitled "An act to enlarge the powers of the several corporations of the *District of Columbia*, and for other purposes:" by which it is enacted "that the corporation of *Washington*, the corporation of *Georgetown*, and the corporation of *Alexandria*, within the *District of Columbia*, shall, severally, have full power and authority to subscribe and pay for shares of the stock of the *Chesapeake and Ohio Canal Company*; and all such subscriptions as shall have been already made, by either of the said corporations, shall, and the same are hereby declared to be valid, and binding on the said corporations respectively." If these corporations, anterior to May, 1828, possessed the power of subscribing for canal stock, why the necessity for an act of *Congress* expressly creating this power, and declaring valid and binding on the said corporations respectively, subscriptions, by them, antecedently made?

But it is contended, that conceding the invalidity of these subscriptions, prior to the passage of the act of *Congress*, to constitute the amount of stock, requisite to the existence of the contemplated corporation; yet, that by the act of *Congress*, they were rendered valid, to all intents and purposes, in the same manner, as if this act of *Congress* had simultaneously passed. There is nothing in the act of *Congress* itself, in the principles of justice or the analogies

of the law, to sustain this position. There are no words, in the act of *Congress* to favor such a construction. The terms used, are as precise, unequivocal, and comprehensive, for the purpose designed, as language could make them—the subscriptions were to be valid and binding, on the said corporations, respectively; and on them only. Not as is now insisted, to be “valid and binding” to the destruction of rights, legally and intermediately invested in third persons. Retrospective laws, upon every principle of sound interpretation, are to be construed strictly, and not extended beyond their obvious, natural import. Upon what grounds, then, can it be seriously urged, that the meaning of *Congress*, in this case, is, not only to be carried to the fullest extent, which the import of the terms used will bear; but that you are to add to the enacting clause, without one word or circumstance indicating such a legislative design, “that those subscriptions should be as valid and binding upon all persons whatsoever, as if those corporations, at the time of subscribing, possessed the power then given them by this act of *Congress*?” To have passed such a law, to operate in a contest like the present, was not within the powers of *Congress*, had they designed to exercise such a right. Even though it should be conceded that they could have made the subscriptions, from their date, valid and binding on the State of *Maryland*, which I deny; yet they could not have made them so, on the *Baltimore and Ohio Rail Road Company*, whose intermediate rights were lawfully acquired from the State of *Maryland*. Such an attempt would, not only have been inconsistent with the plainest dictates of justice, but subversive of the fundamental principles of civil government; and in spirit, a violation of that principle of the constitution, which forbids the passage of laws impairing the obligation of contracts. To impute to *Congress*, such an outrage, from an act of legislation, like that now before us, would be, to say the least of it, so uncourteous an extension of judicial

power, that no court of judicature entertaining a just respect for themselves, would ever sanction it.

That a statute, affecting a corporation *in esse*, is only operative thereon from the time of its acceptance, is abundantly shown, by the authorities cited on the part of the appellees; if authorities for such a proposition could be deemed necessary. It is an assumption which needs no authorities, that the organization of a company under such a law, as that constituting the *Chesapeake and Ohio Canal Company*, is *per se* its acceptance. If then the rights of this corporation accrue at the instant they accept their charter, or in other words become a corporate body, it follows that the accrual of their rights did not occur prior to the 24th of May, 1828, and that, as far as mere priority is concerned, they must yield precedence to the *Rail Road Company*. But to evade the force of this sound, natural, and common sense inference; it is contended that as soon as the *Chesapeake and Ohio Canal Company* springs into being, they are invested with all the rights and powers designed to be conferred on them, not from the date of their actual existence and investiture, but from the date of their charter. And this doctrine has been insisted on, upon two grounds; on one or the other of which it is said to be clearly sustainable. *First*, it is contended that from the nature of the franchises, about to be erected, they must be regarded from the date of the charter, as “rights *sui generis*, with a latent and indefeasible capacity of future attachment,” &c. To sustain the legal recognition of this class of “rights,” unintelligible, to minds not perverted by the most subtle refinements of legal technicalities, it was to have been expected, that at least some adjudication would have been adduced. In this expectation however, I have been disappointed. And being, in accordance with the spirit of the times, opposed to innovations on the common law not resting on reason and justice, but the offspring of abstruse refinement and incomprehensible subtleties, I cannot prevail on myself, without stronger reasons

than exist for it in the present case, to admit the existence of this novel species of rights.

The ground which was next relied on in support of the principle of relation, was, that from the date of the charter of the *Chesapeake and Ohio Canal Company*, all the rights with which it was intended to invest them, passed out of the States of *Maryland* and *Virginia*, and remained in abeyance, until the company was formed in whom they might legally vest: and that among these rights, passed that of eminent domain, over the whole section of country, watered by the *Potomac* and its tributaries, above tide water: comprehending perhaps a territory of two or three hundred thousand square miles. That the grant by *Maryland*, therefore, of any portion of this right to the *Rail Road Company*, was inoperative and void—she possessing no such power, could not communicate it to others. To support this doctrine, so astounding in its enunciation, nothing like an express adjudication has been produced; but it has been argued so much at length, and with so much earnestness on both sides, that it might from that circumstance, be well imagined to be a question of great difficulty and doubt, on the decision of which the whole merits of the controversy depended. It was attempted to be sustained upon principles of reason and justice, of policy, of intention in the legislature, of dedication to pious and public uses, and as being clearly within the principle of abeyance. This state of abeyance, it did appear to me when the idea was started, in the argument, and subsequent reflection has confirmed my first impressions, was so wholly irrelevant and inapplicable to the circumstances of this case, that I regarded the invocation of its aid, as the last effort of extreme ingenuity, contending with difficulties insurmountable, by which it was threatened to be overwhelmed. This “absurd and unintelligible fiction,” as it is denominated by one of the most profoundly learned and able jurists, that has ever written upon the laws of *England*, is always odious and never tolerated, but from necessity. From necessity, because, without its ad-

mission the grant must fail to take effect; upon no other legal principles could it be sustained: without it, the intention of the grantor would be wholly defeated. 4 *Kent Com.* 252. Is this the condition of the grant made to the *Chesapeake and Ohio Canal Company*. Can no company be organized, under the law, unless you adopt this wild notion of abeyance? Might not every letter, word and object of the legislature have been gratified, and yet the right of eminent domain have remained in the State of *Maryland* until the *Chesapeake and Ohio Canal Company* were in being, and competent to exert it. If so, and it is impossible to deny it, the essential ingredient, that which is inseparable from the doctrine of abeyance, the necessity of resorting to it, as the only means of effectuating the grant, is wanting; and the principle is therefore wholly inapplicable to the case. This necessity does not depend on subsequent contingencies; it must exist at the instant the grant is made, or it can never exist at all. If the States of *Maryland* and *Virginia* had, in express terms of present grant, given to the *Chesapeake and Ohio Canal Company* the power of eminent domain, as now claimed; thus evincing a determination immediately to divest themselves of that right, there might have been some apology, for resorting to this far-fetched absurdity called abeyance. Because, the States having in express terms, parted with this right, and the *Chesapeake and Ohio Canal Company*, not being competent to take it, there is some pretext for saying, according to the fictions of abeyance, that it passed into the clouds, there to remain until the *Chesapeake and Ohio Canal Company* should spring into life, when it would descend upon them. But have *Maryland* and *Virginia* attempted the commission of such an act of rashness and folly, conceding to them the right to do so? which, however, I deny. Nothing bearing to it the most remote resemblance is to be found in their law. The 15th section, is the only one to be found on the subject. That simply declares that, “whereas it is necessary for the making of the

said canal, locks, dams, ponds, feeders and other works, that provision should be made for condemning a quantity of land for the purpose; “be it enacted, that it shall and may be lawful for the said president and directors, or a majority of them, to agree with the owners of any land, through which the said canal is intended to pass, for the purchase or use and occupation thereof; and in case of disagreement, or in case the owner thereof shall be a *feme-covert*, under age, *non compos*, or out of the State or county, on application to a justice of the peace of the county in which such land shall lie, &c. he shall issue his warrant to the sheriff, to summon a jury to value such lands, and upon payment of the valuation, the *Canal Company* are to be invested with the title thereto.” It is the intention of the legislature, to be collected from what they have said, that must control the construction of their act; so far as they have disclosed an intention to bind themselves, or part with their privileges, and no farther, can we hold them bound. There is nothing in the language of the act of assembly; or the subject matter to which it applies; or the nature of the corporation or franchises, which it was designed to create, tending to give a momentary countenance to the intent imputed to the general assembly, or to the interpolation of this extraordinary principle of abeyance. On the contrary, every clause and sentence of this act of assembly is in accordance with the common sense, sound legal axiom of the law, that those rights which pass not to the grantees, remain in the grantors. What motive could have induced the legislature, in this case, to have acted in reference to a different rule? If their object were, as no doubt it was, to expedite the formation of the *Canal Company*, would it have been, with most certainty effected, by the measures imputed to them? Would any individual have more willingly subscribed for stock, because the rights, which he thereby acquired, passed to him, not by immediate transition from the State, but in a way, which none but minds strongly imbued with legal subtilties, not to say absurdities, could

comprehend? Would it not have had a tendency to delay the filling of the subscription list, when those who were peculiarly interested in the subject, saw there was no motive for haste, that they might await their own convenience; as all power of revoking or impairing the grant, or creating a rival enterprise, had passed from the hands of the State. There was then no motive for inconvenient dispatch; they might with safety wait, and speculate on events. Had the legislature designed to seal up their powers, in this incomprehensible mysterious abeyance, would they not have limited some period, at the expiration of which, they should be restored to them, in case the contemplated corporation should never be in a capacity to exert them? It cannot be said, that their omission to do so was the result of an entire confidence, that such a contingency could not occur. The reverse is the truth, as is demonstrated by their legislating for such an emergency, and declaring, that if the requisite amount of stock were not subscribed, the subscribers should be released from their engagements: thus sedulously providing for the protection of the interests of all parties concerned, but of themselves and their constituents. Is it fair to impute to our public functionaries such unpardonable negligence, or intentional violation of their duties? Should we not in candor presume, that the legislature never intended to divest themselves, to our injury, of those powers which were confided to them for our benefit, until that corporation came into *esse*, by which they were to be beneficially exercised—that until then, their sovereign power of legislation remained unimpaired, and needed no statutory reservation to preserve it? If such were the conceptions and designs of the legislature, and the language they have used, as it is, be in accordance with them, is there any stern, unbending rule of law, by which, in a case like the present, the manifest intention is to be frustrated, and sovereignty disrobed of its characteristic and noblest attribute, by the seal of abeyance being stamped on its powers? If in the constitutional code of laws of any civilized nation, the ap-

plication of such a principle be tolerated, it should not find its way into the free and enlightened institutions of this country, by judicial legislation. From its introduction through any other source we have nothing to fear.

The right of eminent domain is only vested in the State, and can only be exercised by it, for the promotion of the public welfare. No transfer, or disposition can be made of it, for any other purpose. It is a power which is of the essence of sovereign government: and must always remain in a state, capable of being exerted for the public good. Such is the inherent, inviolable condition of its tenure. The State can pass no law, either utterly annulling the right, or suspending its exertion for an indefinite period, which could in anywise control subsequent legislation; until the right *vests* elsewhere, to be used for the public benefit, it always remains in the State. And even where the power to exercise it, is confided to others, they are not to be regarded in the character of its owners or possessors, but the instruments or agents, through whom its execution is effected by the State. Upon these grounds, the right depends, according to the fundamental principles of our government; and the interests of the community are deeply concerned in their inviolate preservation. In conformity thereto, should all legislative enactments on the subject, be presumed to have been made, unless such presumption be conclusively rebutted, by the terms of the laws themselves. The provisions of the charter of the *Canal Company* are in strict unison with such a construction; and are only made to violate it by an unnatural, wild, and strained interpretation; or rather by ingrafting on the act, an entirely new provision, unnecessary, impolitic, and improper in its operation, and which never entered into the imagination of the general assembly. And for what purpose are we urged to do this? That we may give to the *Canal Company* powers and priorities with which the law has not invested them; and convict a subsequent legislature of a breach of faith, and of duty, and of a violation of the constitution of the *United*

States, which they had sworn to support. The rail road charter does impair, or designs to impair, the rights secured to the *Canal Company*, if any of the positions of the appellants be sustained, except that which relates to the true construction of the rail road charter itself. The rule is and should be, *omnia rite acta fuisse præsumuntur.*” It applies, more strongly, to the acts of co-ordinate branches of the government, than to those of courts of judicature. The power of courts of justice, of declaring an act of the legislature unconstitutional, in this State is drawn from necessity: and whilst I admit its existence, I am firm in the conviction, that it should never be exercised, but in a clear case, where the usurpation of authority stands free from doubt. If this high and delicate power be lightly or wantonly exerted, or in any other than cases where the mind harbors no reasonable doubts, as to the infringement of constitutional principles, it will lead to consequences, more ruinous to the public interests, than would attend its non-existence.

But where the necessity of introducing into this case, the magical term “abeyance?” Its introduction, in construing the act of the legislature relative to the *Canal Company*, serves but to perplex and confound what is otherwise simple and unambiguous. The cases, referred to in support of it, are those of *present grant*, not where a mere mode of creating a franchise or right, is provided for by law. They are cases where the grant must operate in *presenti* or never. Here there is no absolute, or immediate grant of a franchise, which must take effect *instantly* or never: nor is it a grant on a condition precedent or subsequent, by which irrevocable rights instantly pass from the grantors. But it is, as it were the mere offer of a bargain, a naked authority, which, until accepted in the mode prescribed, is revocable at the discretion of the party from whom it emanates. This, surely, would be its condition, if this charter were the act of a private individual. Can a reason be assigned, why a different construction should be placed upon it, when regarded as the act of a legislative body? What is a statute, or act

of assembly, but the mere expression of the will of the legislature?

The adoption of the notion of abeyance makes the legislature to do, what is inconsistent with their duty, and irreconcilable with the attributes of sovereign legislative power: and imposes on them this absurdity, without motive or object; whereas their duty to their constituents, the interests of the community, and all sound legislative policy should have prompted them to a course of conduct, the reverse of that which is ascribed to them. They would be binding themselves for a period indefinite, when no equivalent obligation was imposed on the party with whom they designed ultimately to form a contract. No time was limited for the organization of the *Chesapeake and Ohio Canal Company*; none prescribed, when the important prerogative of legislating for the public good, according to the exigencies of the times, and the improved lights of science, might descend from the clouds, and light again on the sovereign legislature of the State. No human foresight could with certainty predict such a reinvestment of power. It could not be effected by limitations or length of time, until there be a party in *esse*, whose right might be impaired by such a positive or presumptive bar. If, therefore, a thousand years were to elapse, before any company were formed under the canal charter, the State, though enjoying none of the contemplated advantages, which formed the consideration for the cession of their rights, would still be hung up in this state of abeyance. It could not in any part of the territory, watered by the *Potomac* and its tributaries, open a public highway; authorise the construction of a turnpike road; condemn, as is usual, the site of a town, or sanction any other internal improvement; not even grant to the *United States* or to itself, the land necessary to erect a fort or arsenal, no matter how urgent a necessity therefor, may have been produced by a state of war. Can a court of justice, unless impelled by a force of language which leaves no alternative, which admits of no other ra-

tional construction, be induced for a moment to countenance such a theory. According to my view of the subject, without violating the plainest principles of reason, justice, policy, the express words of the law, and the manifest intent of its framers, it is impossible to do so. What motive could have prompted the legislature to such a suicidal act? May not every rational design, which can be imputed to them, be as effectually accomplished by their retaining the power, till it vested elsewhere in a capacity to be exerted.

And this state of abeyance, if once endured, must be interminable, unless, per chance, a *Chesapeake and Ohio Canal Company* should spring into existence: and consequently presents this strange incongruity; if no body corporate comes into being, in whom, by the terms of the grant, they can vest, the rights of the State are irrecoverably gone; by no possibility can they be re-acquired; but, if those rights vest in the grantees, there is some hope for the State. It may be restored to its lost inheritance, which it sold for less than a pot of porridge, by purchase, by forfeiture, or by the *Chesapeake and Ohio Canal Company* ceasing to have further occasion for its use. Such an absurdity has no analogy in the law to sustain it: no reason, resting on expediency or necessity. It was suggested, that such a construction was necessary, in order to protect the *Canal Company* from the effects of conflicting, unjust, and inconsistent legislation. Has the constitution made any provision against such acts? If not, can a court of justice do so? Can they mould laws and constitutions as suits their pleasure? And for what purpose are they now asked to do so? To prevent the legislature from exercising their inherent rights, lest according to the court's notions on the subject, they may exert them unwisely, unnecessarily, or inconsistently. Of their conduct, in this respect, they are themselves the sole, the exclusive judges. The constitution has imposed on them no such interdict: it is neither our province, nor within our powers to prescribe it. To interpret their acts, or adjudicate on such a presumption, would be an indignity

to the legislature, that this court could not permit themselves to offer. Were we to do so, it would be but a consistent extension of the same principle, to determine, that the general assembly having once legislated, their power of future legislation on the same subject, was in abeyance, lest they should act unwisely, unjustly, or inconsistently.

As respects the right of eminent domain, the same power has always been given to the turnpike road companies, that is conferred on the *Chesapeake and Ohio Canal Company*. Was it ever before suggested, that until the location of those roads were made, the right of eminent domain over the whole section of country in which their location was authorised, had passed out the State; and that no public highway could be laid out through it, until those turnpike roads were definitively located. On the contrary, have not the legislature, under such circumstances, been in the constant habit of opening public roads, as if no restriction had been laid on their powers: thus giving a legislative interpretation to their acts, and announcing their intention to be, the reverse of that which it is now insisted to have been.

According to this doctrine of abeyance too, if, immediately after the passage of the canal charter, and the assent to it by the *Potomac Company*, and before one share of stock had been subscribed, *Virginia, Maryland, Congress*, and the *Potomac Company*, had for reasons the most cogent, determined that the charter of the *Chesapeake and Ohio Canal Company* should be annulled; and in pursuance of such determination, the *Potomac Company* had revoked their assent, and *Maryland, Virginia*, and *Congress*, had repealed their laws, yet it was competent to have proceeded and organized the *Chesapeake and Ohio Canal Company*; and when organized, they would have been clothed with the same powers and immunities, as if those repeals and revocation had never taken place: and this without the aid of any constitutional provision. Does this appear to be either reasonable or just? is it such an intention as ought to be imputed to the parties to this charter? Unless restrain-

ed by some constitutional or fundamental principle of civil government, what one legislature enacts, the same, or its succeeding legislature, may modify or repeal, either in whole or in part. Until the corporate franchise was acquired in the mode pointed out by the canal charter; *Congress* and the legislatures of *Maryland* and *Virginia*, or either of them, as far as their respective interests were concerned, might at discretion have exerted this power. The right appears to me incontrovertible: the only question could have been the expediency of its exercise; and of this the legislature are the uncontrolled, exclusive judges. To restrain the legislative power, in the manner here attempted, is to fetter it with a restriction which no principle of constitutional law, of civil government, of reason, or of public policy, either authorises or requires. It is essential to our well being and prosperity, as a nation, that they who legislate for our benefit, should be left free to act, as their wisdom, prudence, and sense of justice, may dictate. And that in their sphere of action, in providing for the public weal, no restraints should be imposed on their powers, which are not to be found in our constitutional code, or in those fundamental principles which are the basis of all civil society. If, from misrepresentation, or ignorance of facts, or misconception of our rights or interests, they are led into error; they should be permitted to retrace their steps, to correct their mistakes. The existence of such a privilege is of the essence of legislative power: to withhold it would be productive of ruinous consequences. What is there in the charter of the *Chesapeake and Ohio Canal Company* to make it an exception to this general rule? Considered in its proper light, it is nothing more than the offer of a bargain by three States, which, upon its acceptance, forms the contracting party on one side; the grantors. Until such acceptance, either of those States might revoke or alter its proposals at pleasure. It is in no wise distinguishable from a similar offer made by a private individual in reference to his own domain. And the same right of amendment, mod-

ification, or revocation of such offer would exist in the one case, as the other. With as much propriety may you apply this doctrine of abeyance, to the common cases of unaccepted contracts between individuals. As if A proposed to B to go to *Washington*, or pay me £10, and you shall have my horse, although B make no engagement to do either; yet A's right to his horse is put in abeyance, and he cannot be restored to his right of property, by withdrawing his proposition.

The argument is, "that when the corporation comes into life, the franchise which existed before *de jure*, then vests *de facto*, and relates back to the date of the charter, having the same operation as if the *Canal Company* had then been in existence." If this position can be sustained, there could be no such thing, as seniority in grants of land in *Maryland*, issued under the same order of the *Lord Proprietary*, or of the *Governor and Council*, or of the same act of the *General Assembly of Maryland*. And if by a subsequent order, a particular manor were granted, and afterwards a part thereof granted under a survey, authorised by the prior orders, the junior grant would have priority over the senior: contrary to the repeated decisions of all the courts in *Maryland* upon that subject. Indeed it would follow, that after the acts of assembly, or orders of the *executive council*, have, upon the terms and conditions therein specified, authorised the citizens of the *United States* to acquire title to all, or any of the vacant lands in the State, that those acts of assembly, or the orders of council, could not subsequently be changed or repealed; the rights of the State having been thereby, put in abeyance. And yet such repeals and modifications have uniformly been made, and it never entered into the imagination of man, to question their legality, or to carry back a title, beyond the period at which the grantee acquired an equitable title, by locating his land warrant.

Under our act of assembly, entitled "an act to incorporate certain persons in every Christian church or congre-

gation in this State," every religious denomination may become incorporated, by complying with the prescribed requisitions. By this notion, of relation to the date of the law authorising an incorporation, all of those corporate bodies come into existence at the same instant of time: there is no such thing as seniority amongst them; although, in point of fact, some of those Christian congregations had been duly incorporated, twenty years before others ever existed, or were known as a religious sect, or denomination of Christians. And if 500 years had intervened, it would not vary the principle. Should the State, for the encouragement of religion, direct its treasurer to divide \$10,000 on the 1st January, 1833, amongst all the religious societies, incorporated under that act; a christian congregation, conforming to the provisions of the law, fifty years afterwards, might, by this retrospective operation, claim its distribution of that, of which it was never designed to be a participant.

If the *Chesapeake and Ohio Canal Company*, by this doctrine of abeyance and relation, is, upon its being ushered into life, to be considered as clothed with the rights of the State from the date of its charter; upon the same principle, the proposition is incontrovertible, that they are invested with all the rights and property of the *Potomac Company*, from the time of their assent to the canal charter: which assent was given, as it was designed to be, soon after the passage of the act of assembly under which it was made. They could no longer collect tolls, or do any other act authorised by their charter. Was such the design of the legislature? Could they have intended, to prompt the *Potomac Company* to such an act of folly, and ruinous injustice to themselves? That all their dearly bought rights and privileges should be suspended; the public deprived of the enjoyment of the canals and locks constructed for their benefit, to gratify an absurd, unnecessary, technical fiction, which in truth, has no application to such a subject. If the States are to be held as having made this wanton, useless sacrifice of their rights, human ingenuity can-

not suggest a ground, on which, the *Potomac Company* can be rescued from a similar fate. Abeyance is equally applicable ; if it does not more strongly apply to acts of individuals and corporations, than to those of a sovereign State.

If, then, fifty or a hundred years had elapsed (as it well might and probably would, but for the subscription of \$1,000,000 obtained from the *United States*, at a moment the most auspicious,) before the *Chesapeake and Ohio Canal Company* had been warmed into life, and during that interval, the profits received by the *Potomac Company*, if any they could receive, had been millions ; the whole of it would have vested in the *Chesapeake and Ohio Canal Company*: and no interest would be allowed the *Potomac Company* on their capital during this period. Would this be justice ? Could it have been the intention of the legislature, or the understanding of the *Potomac Company*, when their assent was given ? Had the *Canal Company* been immediately organized by the terms of their charter, the stockholders in the *Potomac Company*, at the par, or nominal value of their stock, were to be adopted as stockholders in the *Canal Company*. In this situation of the parties, the proposed substitution administered justice to both sides ; but can it be conceived, that either the legislature or *Potomac Company* intended, that if the organization of the *Canal Company* were delayed for a century, and during this period, the profits of the *Potomac Company* were four times the amount of its stock, yet it all became the property of the *Canal Company*. Such glaring injustice finds no support in the express words of the law, upon no principle of construction or implication does it receive the slightest sanction. Of the use and profits of their stock, the *Potomac Company* remained in the enjoyment, until they were substituted to an equivalent, by the organization of the *Canal Company*. So, upon the most extended idea of the transfer of the right of eminent domain, which can be insisted on with the the semblance of plausibility, to sup-

port it, the State continued in possession of it, until it vested in a being, in *esse*, competent to exert it for the purpose for which it exists. As was before remarked, the power of eminent domain is the inseparable attribute of sovereignty; and is held as a high and sacred trust, delegated exclusively, and to be exerted only for the public good. It is a right, in its nature unalienable, except to those, who, exercising it in consummation of the designs for which it was granted, are regarded, *pro hac vice*, as the agents or instruments of government. It cannot be granted to those who are incompetent to exert it: neither can the sovereign power disrobe itself of this, its noblest prerogative, nor place it in abeyance, or in any condition in which it is incapable of being exercised, where the interests of the public demand its exertion. These are implied conditions inherent in the nature of the power, and indissolubly attendant on its possession.

By the act of the general assembly of *Maryland*, passed in 1704, the vestry of every parish in the State, are empowered, upon the same principles that the *Canal Company* are authorised to exercise a similar right, to condemn two acres of land, for the building of a church or chapel of ease. And by an act passed in 1719, for the encouragement of iron manufacture, any person or persons were authorised, in like manner, to procure the condemnation of sites for forge mills, and iron works, each condemnation to embrace 100 acres of land. If the doctrines of the appellants be sustained, it follows, that, by these acts of assembly, the right of eminent domain over all the lands in the State was put in abeyance, until every suitable site for such a purpose should be improved, which will not be the case, in all probability, for centuries to come. The State, therefore, after the year 1719, had no more power to pass any right of eminent domain to the *Chesapeake and Ohio Canal Company*, than after the passage of the charter of that company, it could communicate it to the *Baltimore and Ohio Rail Road Company*. Their argument proves too

much ; it annihilates their own rights, whilst it destroys those of the rail road ; it involves both companies in one common ruin. The same remarks are applicable to the act of assembly passed in 1704, to encourage the building of water mills, by condemning ten acres of land for each site. And, notwithstanding these acts of assembly, that banished to the clouds or the moon, the right of eminent domain, which only returned to earth, as the exigencies under those laws demanded its re-appearance, yet, at every session of the general assembly, from the year 1704, to the present time, that power had been exerted in opening public highways, &c. ; and such, the exercise of this power, had produced at various times before the legislature, in court and out of court, controversies of the most important and warmly contested character ; yet, wonderful to tell, neither the legislature by whom the laws were enacted, nor the lawyers, nor the judges by whom they were scrutinized and sustained, until the present trial, ever dreamed of the discovery, now made : that all their proceedings were erroneous, being founded on the right of eminent domain, which did not exist in the State, having taken its flight from *Maryland* in 1704.

The appellants say, it is comparatively unimportant “when and how the company was organised as a body corporate, and acquired a capacity to be fully invested with their corporate franchises ; whether in November, 1827, when the required *quota* of stock was subscribed ; or in May, 1828, when the subscriptions of the district corporations were confirmed by *Congress* ;” their rights take date not from that period, but from the day of the passage of the charter of incorporation ; and are, to all intents and purposes, the same, as if the corporation had been brought into immediate existence, by the charter itself. This is extending the principle of “relation,” in utter disregard of the reasons on which it is founded ; and to an extent which is authorised by no previous adjudication. The cases to which it is applicable, as I have always understood the rule ; are where

clear equitable rights are acquired, which cannot be defeated by him, in whom the legal title remains, but by an act of fraud or injustice; there a junior grant, in conformity to such prior equities, shall exclude or postpone a prior intermediate grant. To illustrate the principle, by the case of common occurrence in *Maryland*: A locates his warrant on *Black Acre*; returns his certificate; pays his composition money; but omits to consummate his title, by obtaining his patent. B afterwards executes his warrant on the same land; and, having complied with all the requisitions of the land office, receives his grant. A patent subsequently issues to A on his certificate. In contesting their rights, standing alone upon their patents, B has the prior and better title: but the court, looking to the anterior equities of A, regard his patent as coeval therewith; and to prevent fraud or injustice upon the principle of equitable "relation," the prior equity and junior grant have precedence of the junior equity and senior grant. But what equities had the appellants, simply on the passage of their charter? What fraud or injustice, would they have suffered by a repeal of the law, or any such modification of it, as the legislature might have seen fit to adopt? None. No rights, either legal or equitable, were conferred on the appellants, but by the requisite acts done in conformity to the act of assembly. Then their equities first arose; and to no more remote period, upon any principle of relation, can they possibly be carried. The appellants seek to apply a new doctrine of "relation," never heretofore recognized, which needs no prior equity to support it: thus dispensing with that which has always heretofore been of the very essence, the fundamental basis, of the rule. And what injustice, inconvenience, and confusion would result from such an innovation, may readily be imagined, by its application to the case before us, under a probable variation of its circumstances, which would not in any wise change the principle. Suppose the *Chesapeake and Ohio Canal Company* not to be in existence until ten years hence and

that during that period, under the faith of their charter, the *Rail Road Company* had completed their entire enterprise to the banks of the *Ohio*. What, upon this new and extraordinary doctrine of relation, would be their predicament? Why, the *Canal Company*, then, for the first moment, coming into being, might locate their works upon the identical ground occupied by the rail road, from *Parr's Spring Ridge* to the waters of the *Ohio*, and not allow the *Rail Road Company* one dollar, for the millions expended in the execution of their work. If such be the doctrine of relation, founded on equity, I am at a loss to conceive, what would be termed "relation," founded on iniquity.

But if "relation" be admitted into the case, to what period are the rights of the *Canal Company* to be translated? Is it to 1823, when *Virginia* passed the law, or to 1824, when *Maryland* adopted it, or to the date when *Congress* sanctioned it, or to the time when any of its supplements were passed? The difficulties and absurdities attending an affirmative answer to either of these questions, unequivocally show, that, to neither of those periods can it be carried: but, that you must go back to the common sense of the case, and fix the time of their acceptance of their charter, as the origin of their rights. The legal subscription of the requisite amount of stock being such acceptance.

It is contended, also, that this charter making the canal a public highway, forms an exception to the general rule applicable to such subjects; and must be regarded as a dedication to public uses: and therefore, effects the immediate transit of the powers of the State. The answer to this suggestion is the same, that was given to the alleged operation of the principle of abeyance. The doctrine of the dedication to public uses is founded on the same necessity, which must exist to support abeyance. It is only resorted to, where the thing granted was intended to pass immediately from the grantor; where its remaining in him, was utterly inconsistent with the grant. Is that the case before us? Was any thing more designed by the legislature, than

an eventual grant ; a transfer of rights upon the formation of the corporation? Until that event occurred, nothing passed ; neither the operation of the grant, in the fullest extent of its terms, and expressions, nor the intention of the grantors, nor any principle of law, require that it should. But would this discriminating feature, if admitted, be of service to the appellants? Concede, that so far as the public are concerned, the rights of the State vest in them. Does that exclude the power of future legislation on the subject? Nay, is it not the very circumstance that gives to the legislature full power and control over it? It is a *concessum* in all the cases of this character, where the power of the legislature has been drawn in question, that over a grant affecting public rights and privileges, the right of future legislation is undeniable, and uncontrolled. The constitutional prohibition, as to impairing the obligation of contracts, has no application to such a grant. It is only to private, not rights in their nature public, that this salutary safeguard was designed as a protection. If then, for these public purposes, the rights of the State passed into immediate dedication, at the date of the act of assembly, there being no intervention of private vested rights to prevent it ; the legislature might at any time resume its powers, or pass any law upon the subject, which its discretion might suggest. Until such private rights intervene, this dedication to public purposes, which is but the creature of the legislative will, exists but at its pleasure. Suppose, by act of assembly commissioners were appointed, to condemn and open a designated road, and hold the same for ever after, as a highway, for the use of the public. Could not the legislature, by any subsequent law, limit, change, or repeal their powers? It cannot be denied.

I have been insensibly drawn into unnecessary prolixity and detail, in the examination of this part of the case, because it appeared to me from the efforts made upon it by both parties, that it was considered the prominent point in

the cause. The other questions, I shall treat with more brevity.

Assuming, that I am right in the views I have thus far taken of this case; the pretensions of the appellant are attempted to be sustained on the ground, that *Maryland*, *Virginia*, and the *United States*, entered into a contract, and were bound to each other, that the *Chesapeake and Ohio Canal* might be made upon the terms stipulated in its charter; and that any attempt, therefore, by either of those contracting parties, separately to repeal, change, or modify, any of its provisions, was unconstitutional and void, as impairing the obligation of a contract. If in truth, there be such a breach of faith on the part of *Maryland*, as is complained of, it might, with some show of reason, be said that it is *Virginia* only, which has a right to complain. The *Chesapeake and Ohio Canal Company* having accepted their charter, with a knowledge of its qualification, as made by *Maryland*, stands not with a good grace before a court of equity, as the voluntary asserter of *Virginia's* rights: who for ought that appears, acquiesces in those acts, which form the subject of complaint. Nay, she has actually assented to them, by passing the rail road charter. Having accepted the charter in the condition in which they found it, they have no equities, by which they can be subrogated to the rights of *Virginia*, if she had any. The *United States* not having complied with the conditions, on which alone *Maryland* consented to be bound, until after the alleged violation of the contract, there would be but little equity on their part, to which the *Canal Company* could fall heir.

But where is the evidence, that such a contract was ever made by these sovereign States? It is, say the learned counsel, the necessary inference to be drawn from their acts of legislation. This is not the mode in which independent governments make compacts. Their engagements with each other, are not entered into in the same loose, unauthentic manner, in which the ordinary transactions of mankind are conducted, where much rests on parol, and de-

pend on inference and conjecture. But all their contracts are matters of express stipulation, formally drawn up by learned and skilful agents, fully disclosing the character of their agreements; and for the most part, preserved in their public archives, as matters of record. Whether there be a contract between them, is never a question depending on remote inference, or vague implication; but is ever a subject of express declaration. Where then is the evidence, of the negotiation on which this alleged compact is founded? It is not even insinuated that it exists any where, unless it appears on the face of their acts of legislation. Does it so appear; let me ask? Is there a word or syllable in any of those laws, which intimates such an agreement? Does the preamble recite it? Do any of the enactments affirm it? Or is there, in their numerous statutes relating to this canal, a word or sentence, which does not receive its full and natural import upon the assumed fact, that there was no such compact? And are not all their enactments in relation to the canal, with their various forms and qualifications, consistent and natural, as the regular offspring or result of spontaneous, concurrent legislation, modified by the peculiar circumstances, and combination of interests, in which the parties were situated, independently of all compact on the subject? But stamp on their acts the character of contract, and how stand the legislatures of *Virginia* and *Maryland*? Convicted of a wanton and wilful violation of the constitution of the *United States*, which they had sworn to support. They not only, do not ask the assent of the *United States* to their compact, as it is now called, but expressly declared that *Congress* shall not assent to their act upon any other authority, than “as the legislature of the *District of Columbia*.” And the *Congress of the United States*, represented as one of the three sovereign parties to this unconstitutional compact, and consequently, alike cognizant of its nature and unconstitutionality, in violation of their duty and their oaths,” as the legislature for the *District of Columbia*, sanction and affirm it. Can more conclusive evidence be

desired, that there never existed such a contract as is alleged, between the three governments, than the bare statement of the consequences, which would follow such an unnatural presumption? Could any thing short of the most irrefragable proof of the fact, induce any court of justice, much less this grave and reflecting tribunal, to cast such an imputation, not only on their own legislature, the high and predominating co-ordinate branch of their own government; but upon the legislature of the Union, and also upon that of one of the most enlightened States in it?

It has heretofore been a maxim, as well of ethics as of law, that presumptions are to be raised in favor of innocency of intention. But in this case, it does appear to me, that we are called on, in favor of the *Canal Company*, to invert the order of every thing which stands in the way of the accomplishment of their designs.

It is urged, that it must be the contract of the sovereign States, because each State legislates for the canal, through its whole extent: as well on subjects within its own limits and jurisdiction, as those in other States through which it passes. But is this conclusion warranted by the charter? Did *Maryland* intend, in virtue of her legislation, to give title to the *Chesapeake and Ohio Canal Company*, to lands or other property in *Virginia*, or *vice versa*? Where the necessity? What the object of the States in mutually delegating, or exercising such an anomalous, if not incommunicable power: even upon the supposition, of the canal charter, being a compact between them? None can be suggested. The common sense, the legal interpretation of their acts, is, that the legislation of each State should operate to the extent of its limits, and no farther, as regards the rights and powers transferred to the *Canal Company*. But that each State, as they well might do, (independently of all authority, interchangeably communicated,) did impose restrictions, by way of condition, extending beyond its territorial limits. As for example; that no higher toll should be exacted on any part of the canal, than that specified in the

law. With as much propriety, may it be said, that the rail road charter is a compact between the States, through which it must pass; the 4th section, enacting, "that the president and directors of said company shall be, and are hereby invested with all the rights and powers necessary to the construction and repair of a road, from the city of *Baltimore* to some suitable point on the *Ohio* river, to be by them determined;" the 15th section, authorising the acquisition of title to the site, &c. of the road, by agreement or condemnation, through the entire route; and the 18th section, containing a similar restriction, as to tolls; and providing, that the capital stock of this company "shall be exempt from the imposition of any tax or burden by the States, assenting to this law." Thus continuing the similitude by showing, that the assent to it, was to be given by other States than *Maryland*. And *Virginia* did assent to this law. Yet I believe the idea never entered the imagination of man, that a compact was thus formed between *Maryland* and *Virginia*.

So far from the restriction in the canal charter, as to tolls, indicating a contract between the States, because each, in passing the law, thus undertakes to establish a rate of tolls, beyond its proper territorial jurisdiction, it shows the reverse. If the charter was a compact between the States, then the limitation in its 10th section, that the tariff of tolls shall not exceed "an average of two cents per ton per mile;" was all sufficient to prevent its ever exceeding that limit: and bound, and protected all the parties. No further provision on the subject was necessary: because, it being the contract of the three sovereigns, the assent of all was indispensable to any change or modification of its terms. And had it been attempted, under the legislative sanction of either of the States, the article of the constitution of the *United States*, forbidding the State to pass a law impairing the obligation of the contracts, would at once have checked such unconstitutional exercise of power. But not having entered, nor designing to enter into any such compact; and

knowing, therefore, that without some further enactment, the company could by consent of any of the States, within their respective limits, raise or alter the tolls, in any way they pleased, they wisely added the following prohibition, to the 14th section; “and no other toll or tax whatsoever, for the use of the said canal, and the works thereon erected, shall at any time hereafter be imposed, but by consent of the said States, and of the *United States*.” Construe this a compact between the States, and this sage addition to their law becomes superfluous, unmeaning tautology. Can you, under circumstances like the present, upon any rule of construction ever heretofore adopted, cause it to be so regarded? The compact in this section, and throughout the charter, is not between the States themselves, but between the *Chesapeake and Ohio Canal Company*, when it shall spring into life, as the one contracting party, and the three several States or sovereignties, as the other. If a compact between the States themselves had been intended, the application for the assent of *Congress*, agreeably to the requisition of the constitution of the *United States*, would have followed as a matter of course. For the necessity of such assent, authorities need not be cited. If such assent be necessary to a cession of part of its territory, by one State to another, as has been adjudicated, and is admitted; it is equally necessary, when two States enter into a contract, by which they bind themselves to each other, to cede to a corporation, highly important streams of navigable water within their limits, and authorise the cutting of canals, &c. in either State: and for that purpose, to exercise the right of eminent domain in both States.

Suppose A, B, and C to be proprietors of three contiguous farms, through which D is about to construct a turnpike road, or any other improvement, that if completed throughout, would be highly beneficial to all; but, if not so completed, so far from being a benefit, it would be injurious to those through whose lands it might be made; and might be the means of defeating the accomplishment of some simi-

lar work, which would otherwise have been ultimately effected. D first applies to A, for permission to make the road, who grants it on condition, that no greater toll than one cent per mile be demanded: and further, that B and C assent to the making of the road through their farms on the same terms. B and C on being separately applied to, give such assent. Between A, B and C, no communication on the subject, of any nature or description ever passes. Before the work commenced, A by the consent of D, or under circumstances in which D's rights were not violated, withdraws his permission. Can he not lawfully do so? Has B or C any right to complain, that he has broken any contract, made with them? Unquestionably not. Can the human mind, aided by all the discriminating acumen and subtilty of the profession, draw a distinction in principle, between the case supposed, and that we are now called on to decide, except that the latter is much the stronger case? What A, B and C did, *Virginia*, *Maryland*, and the *United States* have done; and nothing more. The decision in both cases, must be the same. In confirmation of this idea of a contract between the three sovereigns, it may be asked; if after the completion of the said canal, *Congress* had repealed their law, assenting that a lateral canal be made by *Maryland* through the *District of Columbia*, could not *Maryland* have proceeded to make such lateral canal, in despite of such repealing law, on the ground that it was a nullity, being a law impairing the obligation of a contract? Unquestionably it might. But what contract did it impair? Not any contract between *Congress* and the State of *Maryland*; for none such existed; but the contract between *Congress* and the *Canal Company*. And the State of *Maryland* having the right to make such lateral canal, by their contract with the *Canal Company*, and *Congress* having been bound by their contract with the *Canal Company*, to permit *Maryland* to make such lateral canal, in contemplation of a court of equity, to prevent circuitry of action, *Maryland* is subrogated to all the rights of the *Canal Com-*

pany on this subject, and standing in the stead thereof, may assert the unconstitutionality of the repealing law of *Congress*. Or may, in such character, to the extent of their injury, prosecute in a Court of Chancery, any other remedy for the breach of such contract, which the *Canal Company* could there maintain. This is so familiar a principle of a court of equity, that to sustain it by further illustration or authorities, cannot be necessary. But *Maryland* could be relieved against this repealing law, either in a court of law or equity, on the ground of fraud, (which would avoid it,) independently of any contract between *Congress* and *Maryland*. *Congress* had by contract with the *Canal Company*, agreed that *Maryland* should exercise the power. Upon this assent the conditional contract of *Maryland* with the *Canal Company* became absolute; the *Canal Company*, as they were authorised to do, finished the canal. A subsequent revocation of this power by *Congress*, independently of all idea of their contracting with *Maryland*, would be a rampant fraud, which no court of law or equity would tolerate. Let us imagine, that in the preceding hypothetical case of A, B, C and D, there was not only no contract between A, B and C, but they severally refused to hold any intercourse or contract in any shape, with each other: yet, after the road was finished through the farms of A and B, that C refused to permit D to progress with the road through his farm, to the great injury of A and B. Can it be doubted, that A and B, independently of contract between them and C, but upon the several contracts by A, B and C, with D, might obtain an injunction against C, to prevent his obstructing D in the completion of the road. It is a proposition that admits not of denial. So if, under the repealing law of *Congress*, any of their agents, or those who were bound by their legislation, prevented the opening of the lateral canal, in the mode prescribed by the repealed acts of *Congress*, a similar injunction would issue against them.

In confirmation of the remarks I have made, as to the clear and unambiguous language used by sovereign States,

in contracting with each other, or in consummating a contract by legislation, look to the act of assembly of *Maryland*, passed at November session, 1785, *ch. 1*; and, comparing it with the charter of the *Chesapeake and Ohio Canal Company*, see whether the evidence of compact, on the face of both laws, be in character the same. As to the canal charter, the inference of compact is reached by a forced unnatural construction, not deducible from the objects of the law, or the circumstances under which it passed, nor necessary to gratify one word or expression in it; and involving consequences, which every principle of courtesy, candor, and sound judicial interpretation, prompt us to avoid, by the rejection of such an inference. But turn to the former law, and the compact is so conclusively demonstrated by its title, its preamble, the terms and expressions of its enactments, that nothing is left for inference or conjecture. This is the mode in which sovereign States treat, or form compacts with each other. The title expressly announces "the compact;" the preamble most minutely recites it; and the enacting clause ratifies and confirms it, and declares that, "as soon as the said compact shall be approved, confirmed and ratified, by the general assembly of the commonwealth of *Virginia*, thereupon, and immediately thereafter, every article, clause, matter and thing, in the said compact contained, shall be obligatory on this State, and the citizens thereof, and shall be forever, faithfully and inviolably observed, and kept by this government and all its citizens, according to the true intent and meaning of the said compact; and the faith and honor of this State is hereby solemnly pledged and engaged to the general assembly of the commonwealth of *Virginia*, and the government and citizens thereof, that this law shall never be repealed or altered by the legislature of this government, without the consent of the government of *Virginia*." If the same inference of compact is drawn from these two acts of assembly, so utterly dissimilar, in that respect, in every feature and provision, the old legal axiom, "*et sic de*

similibus," should be changed, and it should now be "*et sic de insimilibus*."

The appellants have also insisted, that their charter, upon the assent to be given, in the mode prescribed by the *Potomac Company*, was a contract between the *Potomac Company* and the States, of which the charter of the *Baltimore and Ohio Rail Road Company* was a violation. How many contracts, this charter, so prolific of contracts and litigation, may be alleged to contain, when passing through the ordeal of such professional ingenuity as has been applied to it, on the present trial, I am at a loss to conjecture. But, it appears to me, that the same arguments which have been urged against a compact between the States, for the most part, apply with equal force, against any such implication with the *Potomac Company*. The assent of that company, in reason and justice, can be regarded in no other light, than as an offer of a bargain to the *Chesapeake and Ohio Canal Company*, which, like all similar propositions, until accepted, was revocable, at the pleasure of the *Potomac Company*. To construe it otherwise, would be an act of unexampled, cruel injustice to that company. The *Chesapeake and Ohio Canal Company* could not be formed, until the *Potomac Company* had given their assent; they might not have been organized for a hundred years afterwards. Yet during all this period, the *Potomac Company* were to go on, expending their money in removing obstructions in the river, and improving its navigation by locks and canals; and, when, perhaps by dint of these expenditures to facilitate transportation, they are about to be re-imbursed, without the power of extricating themselves from their dilemma, they are to be divested of all the fruits of such their labors and disbursements, and for which no reimbursement or indemnity in any shape, is allowed. And what equivalent are they to receive for this? A mere possibility; remote and improbable, as to any beneficial result; the chance, that after all other stockholders receive ten per cent., there may be

something left for them. Some possible dividend may be made on their capital stock, but nothing on such their disbursements. It may be said, that they ought not (their assent being given) to have continued such expenditures. But what was their alternative? Why, to forfeit their charter, and all that had theretofore been expended. Draw from such their assent, the inference of contract, and they cannot escape the consequences I have mentioned. Should a court of equity, as we now are, be astute and technical, in seeking out a construction fraught with such injustice?

It has also been insisted, that, a subscription to the stock of the *Chesapeake and Ohio Canal Company* having been commenced, no matter to what amount such subscribers had acquired rights, which could not be impaired by any act of the legislature of *Maryland*, affecting the terms and conditions on which such subscription was made. This is true, so far as regards the coercion of the subscribers, to comply with the obligations assumed by subscription, but no further. There is no contract, under the charter of that company, between the State and the subscribers, *qua*, individual subscribers. The only contract that could arise, was between the State and the *Chesapeake and Ohio Canal Company*, when brought into being by the subscription of the requisite amount of stock. Before that took place, every thing was in *fieri*. Then, and not till then, are the legislative powers of the State suspended by the constitutional interdiction; then, and not before, does it impliedly contract, not to revoke, or impair the rights and privileges it has granted. To this extent, and no further, have the Supreme Court gone in the *Dartmouth College*, and other cases on the subject. The acts, done at the time of subscribing for stock, are, of themselves, nothing more than a compliance with the mode, by which the assent, to become members of the corporation, is given; and never were designed to create a contract between the State and the individual subscribers. With as much propriety, may it be said, that, if any article of pro-

perty were offered at public auction, and by the terms of sale, no bid were to be received, unless he who made it, in assurance of his punctuality, should deposit with the auctioneer, one dollar,—that upon such bid being made, and payment of the dollar, the owner could not decline proceeding with the sale, or offering it upon new, or different conditions.

It has been said, that “the charter of the *Chesapeake and Ohio Canal Company*, was granted upon individual application; that individuals had spent their time and money, in procuring the information, upon which the legislature acted, in granting it: and that this expenditure was a consideration, which was sufficient to make the contract binding on the State, from the date of the charter; that these individuals were, in fact, the parties interested, and not the persons who subsequently subscribed, and became corporators under the law.” This argument is, I believe, at least entitled to the merit of novelty; but, it passes no encomium upon the strength of a cause, which, in a court of last resort, finds it necessary to invoke it to its aid. If the State be thus bound to these persons, then, have they, under the canal charter, rights above all others: and consequently, a prior right of subscription? Yet no such priority exists. Or if so entitled, the contract, I presume, is mutually obligatory, and they are bound to become members of the corporation. Can they be compelled to become so? And how? Is it possible, that this court, on grounds like these, would venture to declare an act of the general assembly of *Maryland*, unconstitutional?

But it has been alleged, that although the appellants should fail on all the other grounds, on which they have attempted to sustain their asserted priorities; yet, that they are clearly sustainable, under the powers long since granted to the *Potomac Company*, and to which they have been substituted. Before I enter on the examination of this question, let it be premised, that what I say on this subject, relates not to the rights of the *Potomac Company*, or

their successors; to the bed of the river, or to any canals or works which they have constructed. The location of the rail road, as I understand it, interfering with no such rights. The preliminary inquiry arises, what was the character and design of the *Potomac Company's* charter? What were the powers granted? And for what purpose given? On these heads a glance at the act of assembly would satisfy any reasonable mind: but to obtain demonstration on these subjects, all that is necessary, is to compare it with that of the charter of the *Chesapeake and Ohio Canal Company*. The preamble to the charter of the *Potomac Company* gives us the design of its authors, in the following words: "Whereas the extension of the navigation of the *Potomac* river, from tide water to the highest place practicable on the north branch, will be of great public utility: And whereas *it may be necessary to cut canals*, and erect locks and other works on both sides of the river," &c. That a continuous canal between the *termini* of this navigation, was not designed by the legislature: that a delegation of the powers necessary to its construction, was never intended, is to my mind a proposition so manifest, that I can hardly prevail on myself to believe, that arguments are necessary to throw light, as to this subject, on the mind of the most superficial interpreter of the law. The preamble declares, "*it may be necessary to cut canals.*" For what? "The extension of the navigation of the *Potomac* river." And in conformity herewith, the 4th section of the law transfers to the company the authority "to cut *such canals*, and erect such locks, and perform such other works, as they shall judge *necessary* for opening, improving, and extending the navigation of the *said river.*" The 10th section enacts, that the said *river*, and the works to be erected thereon, in virtue of this act, when *completed*, shall forever thereafter be esteemed and taken as a public highway, on payment of the tolls imposed by this act. The 17th section declares, "that the tolls herein before allowed to be demanded and received at the nearest convenient place below the mouth of the south branch, are grant-

ed, and shall be paid on condition only, that the said *Potomac Company* shall make the *river* well capable of being navigated in dry seasons, by vessels drawing one foot water, from the place on the north branch, at which a road shall set off to the *Cheat* river, agreeably to the determination of the general assemblies of *Virginia* and *Maryland*, to and through the place which may be fixed on, below the mouth of the south branch, for the receipt of the tolls aforesaid; but if the said *river* is only made navigable as aforesaid, from *Fort Cumberland*, to and through the said place below the mouth of the south branch, then only two-thirds of the said tolls shall be there received; that the tolls hereafter allowed to be demanded and received at or near *Payne's* falls, are granted, and shall be payable on condition only, that the said *Potomac Company* shall make the said *river* well capable of being navigated in dry seasons, by vessels drawing one foot water, from the said place of collection, near the mouth of the south branch, to and through *Payne's* falls aforesaid; that the tolls hereinafter allowed to be demanded and received, at the *Great Falls* are granted, and shall be payable on condition only, that the said *Potomac Company* shall make the *river* well capable of being navigated in dry seasons, from *Payne's* falls to the *Great Falls*, by vessels drawing one foot water, and from the *Great Falls* to tide water; and shall, at or near the *Great Falls*, make a cut or canal, twenty-five feet wide, and four deep, with sufficient locks, if necessary, each of eighty feet in length, sixteen feet in breadth, and capable of conveying vessels or rafts, drawing four feet water at the least; and shall make at or near the *Little Falls*, such canal and locks, if necessary, as will be sufficient and proper to let vessels and rafts aforesaid, into tide water, or render the said *river* navigable in the natural course." And the 18th section provides, "that in case the said company shall not begin the said work, within one year after the company shall be formed, or if the navigation shall not be made and improved between the *Great Falls* and *Fort Cumbertand*, in the manner here-

in before mentioned, within three years after the said company shall be formed, that then the said company shall not be entitled to any benefit, privilege or advantage under this act; and in case the said company shall not complete the navigation, through and from the *Great Falls* to tide water as aforesaid, within ten years after the said company shall be formed, then shall all the interest of said company, and all preference in their favor, as to the navigation and tolls at, through, and from the *Great Falls* to tide water, be forever forfeited.” Adverting to the language of this charter, that the thing to be made navigable and a public highway forever, was the river of one foot depth: to the time within which the work was to be completed, viz: in three years, from the *Great Falls* to *Cumberland*; and ten years, from the *Great Falls* to tide water; (thus giving where one or more canals were to be cut, more than thrice the time that was allowed to complete the residue of the work, where no canalling of any moment was required or anticipated, but where the distance was ten times as great, and the labor and expence necessary to the completion of a continuous canal, tenfold greater,) and adverting to the power given to cut canals, which was of such only, as were “*necessary*” to render the “*river*” navigable; to the original subscription \$220,000, (by which it was contemplated to accomplish the object, for which the company was organized,) an amount insufficient to construct the canal for three miles, at many of the difficult passes between the *Great Falls* and *Cumberland*. Can it be believed that the design of the legislature was, that a continuous canal should be made throughout the whole course of the navigation to be improved? Or that they gave such a power, when they authorised the cutting of “*such canals*” as were “*necessary*” to make the “*Potomac river*,” a navigable public highway. When such power is given, the language of the legislature discloses their intention. As in the preamble to the *Chesapeake and Ohio Canal Company’s* charter, the first words of which are, “*whereas a navigable canal, from the tide water of the river*

Potomac, in the *District of Columbia*, to the mouth of *Savage* creek, on the north branch of said river," &c. "will be a work of great profit and advantage," &c. Not a word throughout the law, about the extension or improvement of the navigation of the "*river*." The cutting the continuous canal, and erecting its appertenant works, were objects for which the legislature designed to provide: and for their accomplishment, ample powers were given.

By the 13th section of the charter of the *Chesapeake and Ohio Canal Company*, that company are invested with all the property, rights and privileges of the *Potomac Company*, "*in the same manner and to the same effect as the said Potomac Company now hold, possess, and occupy the same by law*." In no other way, for no other "effect," or purpose, can the *Canal Company* exercise the "rights and privileges" of the *Potomac Company*, but for the effects and purposes, contemplated by the charter of the *Potomac Company*. The same interests and powers, and nothing more, accrue to the *Canal Company*, exerting the "rights and privileges of the *Potomac Company*" in cutting an occasional canal, or making any improvement in the navigation of the river, as would, before the charter of the *Canal Company*, have accrued to the *Potomac Company*, performing the same work. Although the property of the *Potomac Company* passes to the *Canal Company*, to be used as they see fit, taking care that their rights are not forfeited under the provisions of the *Potomac* charter; yet they have no right under that charter to cut a canal, not necessary to improve the navigation of the river as there provided for, but with a view of using it as the canal authorised by the charter of the *Chesapeake and Ohio Canal Company*. Such a fraudulent device to over-reach the prior rights of the appellees; such deceitful trickery, would not for a moment be tolerated by a court of equity. If, after completion of the *Chesapeake and Ohio Canal*, or pending the execution of the work, the *Canal Company* keeping the "*river Potomac*" navigable, as required by the *Potomac* charter, were to

collect the tolls authorised thereby ; their right to do so could not be the subject of a doubt. If, to effectuate such navigability, it should be necessary to cut a canal at any difficult pass of the river, (putting out of view, the time limited for the completion of their work,) their power to do so could not be brought in question. But what tolls could be demanded for the use of such a canal? None other than those specified in the *Potomac* charter. Was it the intention of the *Chesapeake and Ohio Canal Company* to collect, for the use of that part of the canal they were locating, in collision with the location of the *Baltimore and Ohio Rail Road Company*, no other tolls than those sanctioned by the *Potomac* charter? Was it their design, merely to cut a canal, necessary to make navigable the “river,” in the mode contemplated by the canal charter? If so, then, it may, in fairness be said, they were acting under the powers, possessed by the *Potomac Company*. But would the candor of their counsel permit them to throw out such an insinuation? Would the *Canal Company* for a moment, entertain the idea of making the canal from the *Point of Rocks* to *Cumberland*, (the battle ground) on such a condition? Nobody can believe it. Suppose the *Canal Company*, to draw the whole trade of the river into the canal, (after its completion) or for any other motive, were to suffer obstructions to accumulate in the river, until it ceased to be navigable, as provided for in the *Potomac* charter, and that charter, in consequence thereof, by judgment of a court of law, were forfeited; would the *Canal Company*, thereby, lose all title to that part of the canal, between the *Point of Rocks* and *Cumberland*. If it were made under the powers given by that charter, the consequence is inevitable; it must be conceded. Do the *Canal Company* admit it? They would hesitate long, before they did so. The undeniable fact is, that the *Canal Company* were locating that grand canal, provided for by the *Chesapeake and Ohio Canal* charter, and not any canal, contemplated by the charter of the *Potomac Company*.

How then can they be regarded as acting, under the powers delegated by the *Potomac Company's* charter? In my humble apprehension, it is impossible to sustain them, under this, their last expedient to defeat the well established rights of the *Baltimore and Ohio Rail Road Company*. To do so, would be to strain, beyond all reason, the letter of the statute, for the purpose of violating its spirit and obvious import : to give countenance, nay, encouragement, to fraudulent contrivances and ingenious deceits, which they have never yet received in any tribunal of equity.

The inquiry on this point, the answer to which, settles this question, is most simple. Were the acts of the *Canal Company*, against which the injunction issued in this case, done in execution of the enterprise contemplated by the *Potomac* charter? or in execution of the great work, provided for by the charter of the *Chesapeake and Ohio Canal Company*? If the former, then the *Potomac Company* being first legally constituted, it may be contended, that they are entitled to priority in the selection and appropriation of the route; and the injunction granted to the *Rail Road Company* should be dissolved. But, on the other hand, if the acts of the *Chesapeake and Ohio Canal Company*, complained of, were done, not in completion of the works provided for by the charter of the *Potomac Canal*, but in execution of that stupendous canal, alone contemplated, and authorised by the charter of the *Chesapeake and Ohio Canal Company*, then the *Rail Road Company*, being the senior corporation, and having first made their location, are clearly entitled to all the priorities they claim; and the injunction of the Chancellor should be made perpetual.

But, suppose the *Potomac Company* had, as insisted, originally, under their charter, a power either to have made a continuous canal, or to have improved the navigation of the river by occasional canals, or wholly by sluice navigation. Having once made their selection of the mode, and exercised, as they have done, the right of eminent do-

main, in cutting occasional canals, that power cannot be again exerted, in the making of a continuous canal. The desired improvement being made in one mode, this transcendent power cannot afterwards be exerted in affecting it in another ; otherwise, a continuous, and an occasional canal, might both be cut through the lands of the same individual: an invasion of private rights, a wanton oppression, which the public exigencies at that time, did not require, and which, the framers of the *Potomac* charter never designed to give to that company.

Feeling entire confidence in this view of the subject, that no such power was derived from the *Potomac Company*, as that which brought the *Chesapeake and Ohio Canal and Baltimore and Ohio Rail Road Companies* in collision, I deem it unnecessary to examine the much vexed question, whether, if the *Potomac Company* originally possessed such a power, it could be exerted after the time limited by the 18th section of their charter, for the completion of the improvement of the navigation of the river.

On the part of the appellants, it has been further urged, that the acts of the general assembly of *Maryland*, in relation to the route of the rail road, conferring a general power of location, uncontrolled by localities, are to be so restricted, in their interpretation, as to exclude the right of interfering with the site of the canal ; which, by its charter, is specifically located, on the eastern bank of the *Potomac*. But this position is untenable, because it is wholly unfounded, in fact. It is not true, that in the *Chesapeake and Ohio Canal* charter, there is any specific location given to the canal, confining it to the eastern or western bank of the *Potomac*, or to either of the banks of that river. The 19th section of the law, which alone defines the route and *termini* of the canal, declares, “that the first, or eastern section, shall begin at the *District of Columbia*, on tide water, and terminate at, or near the bank of *Savage* river or creek, which empties into the north branch of the *Potomac*, at the base of the *Alleghany* moun-

tain." Can human ingenuity torture this into any more definite location of this section of the canal, (which only, is involved in the present controversy,) than as fixing its *termini*? Can it be possible, judicially to determine, that the true import of these expressions, is, that the canal shall commence at tide water, in the *District of Columbia*, and thence follow the ravine of the *Potomac* to the bank of *Savage* creek? Is there any thing in the law, or the reason of the law, that could thus fetter its construction? Suppose it had been ascertained, by actual surveys and calculations, made by experienced engineers, aided by the superior and extended lights of science of the present day, as applied to the art of canalling; that, after receiving into the canal the waters of the *Potomac*, at the *Great Falls*, instead of following the sinuosities of that river, by means of its tributaries, and through the interior of the country, on its eastern shore, the canal could be conducted to the bank of *Savage* river, by one-half the distance—at one-third of the expense of labor and money—and in a way to give transportation to three times the quantity of produce, that it would otherwise have borne; could the power of the company, so to construct it, be the subject of a momentary doubt? Admit this power, as you must do, and all this notion of a specific location of the canal, by its charter, of which we have heard so much, vanishes in a moment. For, if the canal be located by its charter, the company possesses no discretion to depart from it. Nor does the preamble, as was supposed by the argument, sustain, in the slightest degree, this doctrine of specific location. Every letter of it is complied with, in exercising the discretion used in the suppositive case, I have suggested.

But it is alleged, that this specific location of the canal by its charter, is demonstrated, by reference to that mass of surveys, reports, dissertations, resolutions, &c. with which the record has been loaded. Or, in other words, that we are to collect the meaning of the legislature, not from the terms used by them, which are explicit, unambiguous, and

full in a pre-eminent degree; but by imputing to them a knowledge of facts, of which there is no evidence, (nor indeed could there be,) that they ever possessed, or if they did, upon what part of it they acted; we are to infer they meant the very reverse of what they have said. This would be stretching the power of judicial legislation, rather farther than the most zealous admirers of the maxim, "*est boni judicis ampliare jurisdictionem*," has ever yet extended it. It would be enacting, not expounding the law. Conceding, however, that we possess the power to do so; and, that upon these voluminous documents, we are now about to declare, the legislature to have done, what, according to our opinion, they ought to have done; and what is that? Why, to give to the *Canal Company* that discretion which they ought to possess, of locating the canal where the lights of improved science, expediency, the great interests of the community, and the successful accomplishment of the enterprize, would dictate: and not tie them down to a location recommended by resolutions passed by conventions, less interested and enlightened, perhaps, than themselves: or recommended by surveys made ten, twenty, or fifty years before. This is the course, pursued by the legislature in this instance; and according to my view of it, is the only action on the subject, which an independent, and enlightened legislative body could have adopted. Indeed, from these documents, no certain, and specific location of the canal could well have been made, as scarcely any two of them agree in that respect. Some confining the canal, on one side of the river *Potomac*; some on another; some crossing the river often; some seldom; and perhaps some in one place, and some in another. Had a definite location been given to the canal, it would have been of a piece, with the practice so generally complained of, in locating turnpikes, and great public highways, with calls for all the little towns or villages, in the vicinity of which, they might probably pass. Had the legislature intended to make a peremptory location of the canal, they would have used apt words for

that purpose; as they did, in providing for the second or western section, (in the clause immediately following that before recited;) which say they, “shall commence at the said termination, and *extending along the valley of Savage creek*, so far as the same,” &c. In not doing so as to the first, and doing so as to second, they distinctly announce the discrimination they designed to make, in the locations of the two sections. The utter silence of the law, as to any designated site, of the first section of the canal; its omission to select or adopt any of the numerous surveys, that had been made; is conclusive of the fact, that the *Canal Company* were left, as they should have been, to an unlimited freedom of choice. In which, they might be influenced by every circumstance, tending to control their choice: whether it related to the obstructions to be removed; the time and expense, necessary to be consumed in doing so; the length of the route; the commercial or transporting facilities to be afforded; their pecuniary ability to accomplish the object, or any like consideration.

But it is insisted, that, although, this court should be of opinion, there is by the charter of the *Canal Company*, no precise location of the canal, confining it to the margin of the river *Potomac*, yet that it is specifically located in the territory, watered by the *Potomac*, and attaches upon all the lands within such territory, and so continues, until the actual location of the canal. To recognize the principle of abeyance, as asserted, would be mercy to the landholders of that immense section of country; when we advert to their condition under the notion of this immense canal: whose location occupies the space for a sea, instead of a canal. The effect of abeyance of the power of eminent domain, would be to prevent the laying out of public highways, or the condemnation of land, for any improvement whatever: in the individual improvement and enjoyment of their lands, the owners were left unrestricted as heretofore. But, the effect of this sort of legislative location of a canal, which is to spread over a section of country of perhaps two hundred

miles in length, and more than one hundred in breadth, to the exclusion of all acquirements of intermediate rights, is to me a proposition so new and incomprehensible in its character; so appalling in its consequences, that I can with difficulty persuade myself, that it was "put forth in sober earnest." If it be sustainable, not only is the State bound by it, but no landholder within the sequestered district, could lawfully do any act by which this franchise of the *Canal Company* could be changed or impaired. To the whole extent of country then, watered by the *Potomac* and its tributaries, containing two or three hundred thousand square miles, this right of the *Canal Company* so attaches, that after the date of their charter, no proprietor of land can build a dwelling house, or mill, or erect any building or improvement upon his property, without incurring the risk of having his buildings and improvements razed to the ground, without any compensation or indemnity, other than what he would have been entitled to, had his property remained in the condition in which it was at the time the act of assembly passed. And where is he to look for indemnity for this suspension of his proprietary rights? The law does not provide it. The contemplated corporation might not have been formed for a hundred years, after the date of its charter, and although during all that time, his hands are tied, he is deprived of the beneficial use and enjoyment of his property; yet for this sacrifice no remuneration is allowed him. But even after the organization of the corporation, and the accomplishment of the object for which they were incorporated; who are compensated? All whose rights have been ruinously suspended? No. Not one in ten thousand. Perhaps the property of not one, in a still greater number, would be touched by the canal or its appendages; and for those only is any indemnity provided.

Have the legislature of *Maryland* a power to pass such a law, had they so designed? Certainly not. They can divest no man, agreeably to our constitutional safeguards, of

the beneficial enjoyment of his property ; but upon making adequate compensation therefor.

If, however, it were shown that the canal, by its charter was specifically located, or in any way located, the rail road charter with the acts done thereunder, is a repeal of it, so far as their locations interfere, above the mouth of the *Monocacy*; the rights of the *Rail Road Company* having been conferred on them by the legislature of *Maryland*, whilst their powers over the canal charter, were unrestricted by any constitutional prohibition. The *Canal Company*, not being then in existence, could be invested with no rights, nor be a party to any contract, which the legislature of *Maryland* could impair, or violate. The selection of the route for the rail road, had been adopted before the *Canal Company* had been ushered into being.

Nor is it true, as has been assumed in the argument for the appellants, that there is no power given to the *Baltimore and Ohio Rail Road Company*, so to locate their road, as to interfere with the location, now claimed by the *Canal Company*. The charter of the *Rail Road Company*, passed at December session, 1826, gives to the company the power of locating the road, in terms as unlimited as could be devised. They are “invested with all the rights and powers necessary to the construction and repair of a rail road, from the city of *Baltimore* to some suitable point on the *Ohio* river, to be by them determined: and they, their agents, and those with whom they may contract for making any part of the same, or their agents may enter upon, use, and excavate any land, which may be wanted for the site of said road.” If a power of location without restriction or exception of place, were designed to be given; expressions more comprehensive for that purpose, could not have been selected. But it is not alone upon these broad and general expressions, that the rights of the *Rail Road Company* rests. By the 2d section of the act of 1826, the State of *Maryland* reserved the privilege of taking stock in the *Rail Road Company*, to the amount of 10,000 shares.

By the 3d section of the act of 1827, passed the 3d March, 1828, the general assembly direct their treasurer to subscribe in their behalf, for 5000 shares of this reserved rail road stock, on condition, that the president and directors of the *Rail Road Company* "shall agree so to locate said road, that it shall go to, or strike the *Potomac* river, at some point between the mouth of the *Monocacy* river, and the town of *Cumberland* in *Alleghany*; and that it shall go into *Frederick*, *Washington* and *Alleghany* counties." To this condition, the president, directors and company of the rail road, assent: the stock is accordingly subscribed for, the money of the State received, and the rail road located accordingly. Yet, it is said under these circumstances, that the location of the rail road, "to go to, or strike" the *Potomac* in the manner aforesaid, was a power not designed to be given to the *Rail Road Company*. It is impossible to go to, or strike the river, without interfering with the route claimed by the *Canal Company*. Having reached the river, the continuing the rail road up the same, is the natural, practically speaking, the necessary consequence, in order to comply with the requisition of the act of assembly, that the rail road should pass through *Frederick*, *Washington*, and *Alleghany* counties. If there could be any doubt, as to the operation of the act of 1826, when construed alone; it appears to me, that the legislative interpretation thereof, by the act of 1827, when no conflicting rights were in *esse*, to be affected by it, must forever remove such doubt. The act of 1827, acknowledges the power in question, to be in the *Rail Road Company*, by the act of 1826. These acts of the same legislature, in *pari materia*, are "to be construed together as one system." In this view of the subject, can there be a question as to their construction on this point? But let it be conceded for the moment, that there were no words in the act of 1826, by which this power could be transferred. I hold it a matter, too clear for argument or illustration, that this power is fully delegated by the act of 1827. At the time of its passage, the legislature were fully

authorised to have granted this power. They agree to pay \$500,000, on condition of its exercise by the *Rail Road Company*. Is not the inference irresistible, the implication of necessity, that they authorised the *Rail Road Company* to exert it? To give to this act of assembly any other construction, would be to convict the legislature of *Maryland*, of an act of absurdity, prodigality and folly, which is without a parallel in the annals of rational men; they intended this, and could have intended nothing else. As well might it be said that if A pay to B \$500, on condition that he would cut down, and haul off all the timber from fifty acres of A's wood-land, that A gave to B no powers under such contract, but that he could sue B as a trespasser or wrong doer, and recover of him damages for every tree he should cut or haul off.

Having by the views already expressed, disposed of the material points in this case, so far as is necessary, to the final decision thereof, I forbear to express any opinion on the point so elaborately, I was about to say unanswerably, argued by the counsel for the appellees, that conceding to the *Canal Company*, seniority of corporate existence, that their charter *per se* gave to them no priority of right, in any particular route for their canal. That such superiority of right, rested entirely on priority of selection, and that therefore the rights of the *Rail Road Company* were paramount. I am therefore of opinion that the decree of the Chancellor, making the injunction perpetual, ought to be affirmed.

DECREE REVERSED AND BILL DISMISSED.

JAMES NAYLOR of GEORGE vs. GEORGE SEMMES.

Where it was the general usage and custom during the time of a certain sheriff, for his deputies to deliver to him all process which came to their hands, when he endorsed such returns thereon, as he, by the said deputies might be directed; this was held to be competent evidence, in an ac-

Naylor vs. Semmes.

tion brought by the sheriff upon the official bond of one of his deputies—the inquiry being, whether a return so made was a false return or not. And although the plaintiff was not entitled to recover, unless the jury believed, that such return was made, either by the defendant, or his directions; yet it was held, that the custom was *per se*, under the circumstances, *prima facie* proof, as between the sheriff and his deputy, of such a return having been made.

It was competent for the sheriff and his deputies, to agree upon such a practice, as a law for the regulation of their own official conduct; but such usage or agreement would not be binding upon the interests of third persons.

A witness cannot decline answering a question, merely because it will subject him to a civil liability.

The refusal of the County Court, to compel an unwilling witness to answer a question, though erroneous, will not affect the judgment of the appellate court, where the answer to the question would be irrelevant or inadmissible.

APPEAL from *Prince Georges* County Court.

This action was instituted by the appellee, against the appellant, on the 27th of October, 1824. The case is fully stated by the judge, who delivered the opinion of this court.

It was submitted on notes, to BUCHANAN, Ch. J., EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

By *Julius Forrest*, for the appellant.

Stonestreet, for the appellee.

STEPHEN, J., delivered the opinion of the court.

This is an action instituted by *George Semmes*, former sheriff of *Prince Georges* county, against *James Naylor* of *George*, the appellant, one of his then deputies, to obtain a reimbursement of a sum of money which he had been compelled to pay to a certain *Thomas Mundell*, by whom a *capias ad respondendum* had been put into the hands of said *Naylor*, to be served upon a certain *John Ellis*, a debtor of said *Mundell*, who, after the service of said process, suffered said *Ellis* to escape.

This suit being instituted upon the official bond of *Naylor*, he pleaded performance and *non damnificatus*. To these pleas the appellee *Semmes*, replied that *Mundell*, on the day therein mentioned, placed in the hands of *Naylor* the appellant, a writ of *capias ad respondendum*, to be served upon one *James Ellis*; that the writ was duly served, but that *Naylor* suffered *Ellis* to escape, and on the return of the process, stated, that *Ellis* had not been taken, by returning a *non est*. That in consequence thereof, suit had been instituted against him, by *Mundell*, in which a judgment had been recovered for a large quantity of tobacco, which he had been compelled to pay; which said quantity of tobacco the said *Naylor*, although required so to do, had not reimbursed or paid to said *George*. To this replication, the appellant rejoined generally. In the course of the trial, the plaintiff to support the issue on his part, read in evidence to the jury, the record of the verdict, and judgment, recovered against him by *Mundell*; and then proved by said *Mundell*, that he had paid him the full amount of said judgment; and then proved by said *Ellis*, that he was arrested by said *Naylor*, and further gave in evidence to the jury, the writ upon which the return of *non est* was endorsed, in the hand writing of the plaintiff, and then proved by *Francis Darcey*, a competent witness, that he the said *Darcey*, acted as deputy sheriff at the same time that the defendant did, and that it was the general usage and custom during the time that he, the plaintiff, (now appellee) was sheriff, for the deputy sheriffs to hand to him, the plaintiff, all process that came to their hands; who endorsed such returns thereon, as he by the said deputy sheriffs might be directed; but that he the said *Darcey*, did not know particularly, whether the said return had been endorsed on the said writ by the direction of the defendant. Whereupon the defendant (now appellant,) prayed the court to instruct the jury, that the plaintiff was not entitled to recover, unless they believed from the evidence in the cause, that the false return charged in the plaintiff's repli-

eration was made by the defendant himself, or by some person by his direction, which instruction the court (KEY, and PLATER, A. J.) very properly gave to the jury. The defendant by his counsel, then prayed the court further to instruct the jury, that the proof aforesaid, of what was the general usage and custom of the plaintiff and his deputies, in regard to returning process, was not legal and sufficient evidence for the purpose of showing that the said return was made by the direction of the defendant. Which instruction the court refused to give, and as we think very properly; as it appeared from the evidence in the cause, that it was the general understanding, and agreement between the high sheriff and his deputies, that any return which he might make by their direction, should be considered as a return made by themselves, such proof was at least *prima facie* evidence of the fact it was offered to establish, as between the sheriff and his deputy, and threw the *onus probandi* of the contrary, upon the defendant; as the sheriff, in consequence of such general usage and custom, might not have any other evidence of the fact of the return being made as stated. It was certainly competent for the sheriff and his deputies, to agree upon such practice, as a law for the regulation of their own official conduct, but such usage or agreement, would not be binding or obligatory upon the interests of third persons. The plaintiff further proved by said *Ellis*, a witness sworn on his part, that the defendant had, whilst acting as a deputy sheriff under the plaintiff, arrested him the said *Ellis*, by virtue of a writ of *capias ad respondendum*, sued out of *Prince George's County Court*, by *Thomas Mundell*, to recover of him a quantity of tobacco. The said witness was, by the defendant's counsel, on cross examination asked, whether the said quantity of tobacco had ever been paid by him the witness. To the competency of which question the witness objected, on the ground, that he the witness, by answering it, might be subject to the payment of a debt; which objection was by the court sustained. To which opinion

of the court, the defendant excepted. In giving this last opinion, upon the ground of the objection stated in the exception, the court below clearly erred; because it is the settled law in *England*, and has been repeatedly decided by this court, that a witness in the course of his examination, is not privileged from answering a question propounded to him, because it might subject him to the payment of a civil debt. In *Taney vs. Kemp*, 4 *Harr. and Johns.* 348, and *The City Bank of Baltimore, vs. Bateman*, 7 *Harr. and Johns.* 104, the cases establish the principle, "that a witness is bound to answer a question touching the issue in an action at law, in which he is not a party, although it may establish, or tend to establish that he owes a debt, or otherwise subject him to a civil suit or bill in chancery." We think therefore, that the court below erred, in excusing the witness from answering the question propounded to him upon the ground of interest; but that they were right in not compelling him to answer it, upon the principle that the answer to the question, whether in the negative or affirmative, could not affect the merits of the controversy pending between the parties, and was therefore irrelevant and inadmissible.

JUDGMENT AFFIRMED.

N. B. This case was decided in 1829, and accidentally omitted.

FRANCIS EDELEN vs. STATE, use JACKSON, *et ux.*

The act of 1818, *ch.* 217, declares, that moneys received for the hire or use of negroes, by an executor or administrator, during the time he is entitled to the possession, shall be assets belonging to the estate, and shall be accounted for by him. And such was the law before the passage of that act. The act of 1798, having made negroes assets, the hire after the death of the owner became assets also. It was an incident springing out of assets, and partook of their nature. It is like the interest arising after the death of the obligee, in a bond given to him in his life time.

Edelen vs. State, use of Jackson.

In an action upon an an administration bond, where the breach assigned was an inventory returned by the administrator, and after sundry disbursements made, there remained a balance of said inventory in the hands of the administrator to be distributed, of which the plaintiff claimed one-fourth as distributee, and the issue was made up upon the truth of such breach, the plaintiff cannot insist upon charging the defendant with any thing not in the inventory, and of course, the hire of negroes, which accrued after the date of the inventory, could not be recovered in such a state of the pleadings.

Where a prayer necessarily raises a point in the County Court, it will be reviewed in this court, under the act of 1825, though under the state of the pleadings, the point ought not to have arisen at all.

APPEAL from *Prince Georges* County Court.

This was an action of *Debt*, instituted by the appellee, against the appellant, on the 10th of September, 1825, on the bond of the administrator *de bonis non*, of *Edward Edelen of Thomas*, dated May 24th, 1827, in which the appellant was a surety. To the plea of general performance, by the defendant, the plaintiff replied that a certain *Edward Edelen of Thomas*, of *Prince Georges* county, deceased, departed this life, at the county aforesaid, intestate, leaving behind him his wife *Mary W. Edelen*, and four children, of whom *Mary W. Edelen*, since married to the said *John S. Jackson* was one, at whose request this bond was put in suit; after whose death the said *Mary W.* the widow and relict of the said *Edward Edelen of Thomas*, had letters of administration granted unto her, on her said deceased husband's estate; and returned an inventory of her said husband's estate, into the office of the *Register of Wills* of the county aforesaid, amounting to the sum of \$5,951 64 $\frac{3}{4}$; and the said State, by its said attorney, further says, that afterwards, and before any account was passed, or further proceedings had, by the said *Mary W.* as administratrix, as aforesaid, she departed this life, and letters of administration *de bonis non*, were by the Orphans Court of said county, granted to the said *Jeremiah Edelen* and *Jacob Edelen*, on the estate of the said *Edward Edelen of Thomas*, who on the 24th day of May, 1827, entered

into bond to the *State of Maryland*, in the sum of 16,000 dollars, current money, with the said *Francis Edelen*, and one *Richard L. Jenkins*, of said county, their sureties, for the due administration of their trust, as administrators as aforesaid, and returned an inventory of the estate of the said *Edward Edelen of Thomas*, which came to their hands as administrators as aforesaid, into the office of the *Register of Wills* of the county aforesaid, amounting to the sum of \$6,437 33½, and made several payments and disbursements out of the said estate, amounting to the sum of \$420 57½; so that there remains a balance of \$6,016 76, in the hands of the said administrators, to be divided between the representatives of the said widow, and the said four children, whereof the representatives of the said widow were entitled to one-third, and the said State by its said attorney, in fact says, that the residue of the personal estate of the said *Edward Edelen of Thomas*, in four parts to be divided, among his four children, after payment of just debts, funeral expenses, and widows' thirds deducted, amounting, to each to the sum of \$1,002 79½, belonging to the said *Mary W.* wife of the said *John S. Jackson*, in the endorsement of the said writ mentioned, as one of the daughters and distributees of the said *Edward Edelen of Thomas*, which said sum of \$1,002 79½, or any part thereof, the said *Jeremiah Edelen* and *Jacob Edelen*, nor either of them, although often required, have not paid, &c.

The defendant rejoined, that the several matters and things in the said replication set forth, are not true, &c. Issue joined.

At the trial of this cause, the plaintiff gave in evidence, the first two settlements, made in the Orphans Court, by *Jeremiah* and *Jacob Edelen*, as administrators of *Edward Edelen of Thomas*. The first account, dated 6th of March, 1820, and proved 9th of August, 1825, stated a balance due from them to the estate of \$6,230 63; and the second account, dated and proved the 9th of August, 1825, stated a balance due from them of \$4,145 19. The defendant

Edelen vs. State, use of Jackson.

then read to the jury an additional account, passed by the said administrators, in the Orphans Court, on the 17th of October, 1827, by which the balance against them was reduced to \$1,401 13. And the plaintiffs then proved, that the negroes mentioned in the inventory, were employed, and worked by the administrators, from the death of the intestate, until 1824, and claimed the hire of the said negroes, to be charged against the administrators, at such price as the jury might think them worth, from the time they took them into possession as administrators as aforesaid, until they parted with them, in addition to the sums charged in their account, in the Orphans Court, to which the defendant, by his counsel objected; but the court allowed the said claim. The defendant excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, and ARCHER, J.

Stonestreet, for the appellant.

1. The defendant was not chargeable with the hire of the negroes, contained in the inventory, under the plaintiff's replication. 1 *Stark. Ev.* 387. 2. The hire of the negroes in this case, is not assets,—the administration having commenced prior to the act of 1818, *ch.* 217.

J. Johnson, for the appellee.

ARCHER, J., delivered the opinion of the court.

It was determined by this court, in the case of *Hall vs. Griffith*, 2 *Harr. and Johns.* 485, that an administrator was bound to account in the Orphans Court, for the hire and use of negroes; and his liability as administrator being thus ascertained, it follows, that he and his sureties are liable on his bond for a failure, in this respect, to discharge his duties. This decision does not declare, in express terms, the responsibility of the administrator, in this respect, to arise at any particular period, whether from the

session, shall be assets belonging to the estate, and shall be accounted for by him.

But the decree in the case above referred to, does not leave any room to doubt, but that before the law of 1818, *ch. 217*, the administrator was liable for the hire and use of negroes, previous to the time allowed him by law, to pass his final account; because the court there adjudged, that he should account for the hire and use, without any limitation, or restriction, as to time. Had the law been otherwise, the decree would have ascertained the period, when the administrator's liability commenced. The act of 1798, having made negroes assets, the hire, after the death of the owner, became assets also, for it was an incident, or profit springing out of that, which was declared assets, and partook of its nature and character in the same manner, as would the interest arising after the death of the obligee, in a bond given to him, in his life time. The administrator would be justly chargeable for the use of the negroes, if such charge were within the issue to be tried. But there is no issue joined, which brings this question before the jury. The sole question, to be tried under the pleadings, was, the verity of the plaintiff's replication, which alleged an inventory returned by the administrators *de bonis non*, and that after sundry disbursements made, there remained a balance of said inventory, in the hands of the administrators, to be distributed, and that the plaintiff, as one of the distributees, was entitled to one-fourth part thereof. The plaintiff, upon this state of the pleadings, could not insist on charging the defendants, for any thing which was not contained in the inventory; because, nothing beyond that was claimed; and of course, the hire of the negroes, which had been accruing from the date of the inventory, could not become the subject of inquiry, and of charge in this suit. But it is supposed, that the act of 1825, *ch. 117*, precludes an inquiry into the correctness of the prayer, upon the ground, that the attempted charge is not within the issue; that act, shutting out an investigation

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into any point not presented to the court below. But we conceive, that the prayer necessarily raised this point in the court below; for the plaintiff's claim, that the defendants should be charged for this use, in addition to the sums charged in their accounts in the Orphans Court; or in other words, that they should be charged with this sum, over and above the amount of the inventory, as returned and charged in their accounts; which presented the question, not only, of the general liability of the administrators to such a charge, but their responsibility under the forms of pleading adopted.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

N. B. This case was decided in 1829, and accidentally omitted to be reported at that time.

SARAH DUVALL vs. THE FARMERS BANK OF MARYLAND.
June, 1832.

When the aid of a court of equity is necessary, to enable the husband to obtain possession of the wife's personal property, he must do what is equitable, by making a suitable provision out of it, for her maintenance, and that of her children.

The wife's equity exists, although there has been an assignment for a valuable consideration; and the assignee, standing in the place of the husband, and seeking to withdraw the funds, will be compelled to make the provision.

In *England*, this principle is founded upon the rule, that the husband, seeking the intervention of a court of equity to gain possession of his wife's estate, must do equity.

It is immaterial, whether the wife asserts her claim to this equity, in opposition to the complainant in an original bill, or by petition, after an order of the court distributing a fund in court, which has not been paid over. In the latter case, it will be considered, as substantially an exception to the auditor's report, distributing the fund out of which she claims payment. Under the order *nisi*, usually passed upon petitions against funds in court, the rights of all the parties interested, will be examined and determined.

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The character and extent of the provision for the wife, would seem in every case to be governed by its peculiar circumstances, and be regulated by the whole amount of the wife's fortune, and what the husband had previously received.

APPEAL from the Court of Chancery.

A portion of the personal estate of a certain *Benjamin Harwood*, who died sometime in January, or February, 1826, being in the Court of Chancery for distribution; a petition was filed by the appellant on the 24th July, 1830, as one of the representatives of the said *Benjamin*, setting forth, that her husband, *Lewis Duvall*, who departed this life in November, 1829, in his life-time, executed certain assignments of her share of said personal estate, to one *Jonathan Pinkney*, cashier of the *Farmers Bank of Maryland*, without her knowledge or consent. That the petitioner had never known until this day, that said fund was in a course of distribution in this court, or that any persons claiming to be the assignees of her share were receiving the same, under its sanction. That on the 22d July, 1830, a further dividend of said estate was made, and reported by the auditor, of which until this day she had no knowledge, and she prayed leave to except to the same, as well as to all preceding reports in the cause, in any way affecting her rights, or share in said estate, and that the administrators of the said *Benjamin Harwood*, deceased, be directed not to pay over any part of said estate, to any assignee of the husband of this petitioner; and that the president, &c. of the said *Farmers Bank*, be directed to bring into court, such dividends as they may have received on the said estate, and that the same, together with all future dividends, be paid to her. The petition further states, that the assignment in virtue of which the bank claims, and which bears date 10th July, 1827, was obtained from her husband when he was not of sane mind for the transaction of business; he having previously been reduced to a state of mental imbecility, which incapacitated him for the manage-

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ment of his affairs, by a paralysis, which she believes was known, at the time to the bank. That prior to this assignment, to wit, in August, 1826, when her said husband had no right to transfer her interest in said estate at all, he had assigned the same to the said bank, and she alleges that the assignment of 10th July, 1827, was merely substituted for that of August, 1826, and so in truth, and in fact, the whole proceedings of the bank, were in fraud of this petitioner, for the purpose of obtaining further security for old debts, due at that time from her said husband. That no part of said estate, ever in fact came to his hands, but the whole transaction was a mere shifting of accounts upon the books of the bank; and that her entire distributive share, is still an equitable *chose in action* in this court, which has survived to her. She therefore, charges said assignment to be void for want of consideration, and fraudulent, and void, as having been obtained from a man utterly *non compos mentis* for such a purpose. The petition then alleges, that if she be not entitled to the entire share of said estate, already distributed, and remaining to be distributed, that at all events, she is entitled as survivor, to the dividend declared on the 22d July, 1830, which she prays may be paid to her, instead of the aforesaid assignees, or that a suitable provision out of said share be made for her, and for such other relief as can be afforded her upon this petition.

Copies of the assignments referred to, marked exhibits A and B, were filed with the petition.

The *first*, which bears date in August, 1826, recites, that the assignor (*Lewis Duvall*,) is indebted to the *Farmers Bank of Maryland*, in the sum of ten thousand dollars, upon two promissory notes, dated on the 10th of March, 1824, "towards the payment of which, he assigned, transferred, and made over to *Jonathan Pinkney*, cashier of said bank, his the assignors wife's interest in the estate of the late *Benjamin Harwood*, (except her proportion of stock in the *Bank of Columbia*,) and he thereby directed the admin-

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istrators of the said *Benjamin Harwood*, to pay the same to the said *Pinkney*, to be applied as aforesaid.”

The *second*, dated July 10th, 1827, recites the indebtedness of the assignor, in the sum mentioned in the previous assignment, his further indebtedness in the sum of \$7,857 upon a note, endorsed by a certain *Richard Duvall*, and *Grafton B. Duvall*, dated 9th May, 1827, at sixty days; upon another note, drawn and endorsed, as aforesaid, for \$300, at ninety days from the 1st June, 1827. Upon a *third*, similarly drawn, and endorsed, at sixty days from 20th June, 1827, the sum of \$750, and several large sums for interest and discounts. The assignment then proceeds; “Towards the payment of said claims as aforesaid, in the order hereinafter to be stated; I do hereby assign, transfer and make over, unto *Jonathan Pinkney*, and for the use of the president, directors, and company of the *Farmers Bank of Maryland*, all my wife’s interest in the personal estate of the late *Benjamin Harwood*, (except her proportion of the stock in the *Bank of Columbia*,) and I do hereby direct the administrators of the said *Benjamin Harwood*, to pay the dividends now due, and as they become due, to which my wife is entitled as aforesaid, to the said *Jonathan Pinkney*, for the use aforesaid, and the money when received, to be applied in the first place to pay off the money which I now owe as aforesaid, or at any time when a dividend is received, may owe for discounts, or interest to said *Farmers Bank*; in the second place to discharge the note aforesaid, for \$1000; to pay the three notes as aforesaid, drawn by me, and endorsed by *Richard* and *Grafton B. Duvall*, and the residue to the discharge as far as it will go, of the note of \$9000, before mentioned.”

The *answer* of the bank, admitted the petitioner to be one of the representatives of the deceased, *Benjamin Harwood*, and the death of her husband, *Lewis Duvall*, as stated by her. It was also admitted, that exhibits A and B, were true copies of the assignments executed by *Lewis Duvall*, in his life-time to the bank. The answer then stated, that no-

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tice of said assignments was given to the administrators of *Benjamin Harwood*, who in compliance therewith paid the assignees \$4,204 93 on the 28th July, 1827; the further sum of \$697 33, on the 19th November, 1827; and the further sum of \$1038 65, on the 13th November, 1828. That the assignments were executed for a full and valuable consideration, and that the moneys received have been applied as directed by that of the 10th of July, 1827. That a considerable balance is yet due of the debts therein mentioned, which they believe the entire interest of the petitioner, in the deceased's estate will be inadequate to discharge.

They do not admit that the petitioner was ignorant of said assignments. They allege that the last of the 10th July, 1827, was executed at the request of *Lewis Duvall*, who was desirous after paying the one thousand dollar note, and certain interest and discounts, to provide for the two notes, endorsed by *Richard* and *Grafton B. Duvall*, and for that purpose, the bank agreeing thereto, the same was executed. The answer denies, that *Duvall* was incapable of managing his affairs when the assignments, or either of them was executed, and it suggests, that as the last was executed for the indemnity of the endorsers, *Richard* and *Grafton B. Duvall*, they ought to be made parties. The answer further states, that after the execution of the aforesaid assignments, the administrators of *Benjamin Harwood* assumed to pay the bank, the amount of the interest of the petitioner, and that therefore, they are not compelled to resort to a court of equity for the fund, which the defendant alleges, is a sufficient answer to the claim in right of survivorship, to receive the unpaid dividends; or for an equitable provision out of the same.

From the reports and statements of the auditor among the proceedings, and the chancellor's orders thereupon, it appeared that the dividends, paid to the bank in the life-time of the petitioner's husband, amounted to between five and six thousand dollars.

On the 22d July, 1830, and after the death of the petitioner's husband, a further dividend was reported, as due the bank under said assignment, amounting to \$1416 29, which report, *Bland*, chancellor, ratified on the 23d, and ordered the money to be paid by the administrators accordingly; but afterwards on the 24th, on the preceding petition, he ordered that the administrators retain the same in their hands until further order, provided a copy of the order and petition should be served on them, and on the bank, before the payment over to it, of the said share.

Afterwards on the 2d December, 1830, the chancellor after argument, ordered that the order of the 24th July, be rescinded and annulled, and the petition dismissed with costs.

From this order the petitioner appealed to this court.

The cause was argued before MARTIN, ARCHER, and DORSEY, J.

Flusser, for the appellant, contended.

1. That appellant is entitled to a provision out of the entire fund, assigned by her husband to the *Farmers Bank of Maryland*. 2. That she is entitled to the whole of the last dividend of said fund. 3. That she is entitled to a provision out of such dividend.

1. Admitting the assignment to have been made for value, the wife is entitled to a provision, the fund being in chancery, and she could not release her title without a private examination by the chancellor. *Lady Elibank vs. Montolieu*, 5 Ves. Jr. 738. *Murray vs. Lord Elibank*, 10 Ib. 90. 3 Atk. 721. *Howard vs. Moffatt*, 2 Johns. Ch. Rep. 206. *Kenny vs. Udall*, 5 Johns. Ch. Rep. 464. *Glenn vs. Fisher*, 6 Ib. 33. *Haviland vs. Myers*, Ib. 25. 2 Kent. Com. 115. Upon the 2d point, he referred to *Wright vs. Morlay*, 11 Ves. Jr. 16. *Burnett vs. Kinnaston*, 2 Ver. 401. *White vs. St. Barbe*, 1 V. and B. 405. *Hornsby vs. Lee, et al.* 2 Madd. Ch. Rep. 349. *Purdew vs. Jackson*, 1 Russell Ch.

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Rep. 42. The circumstance of the wife having been a party to the proceeding by which the fund was brought into court, does not vary the rule. *Carr vs. Taylor*, 10 *Ves.* 580. *Schuyler vs. Hoyle*, 5 *Johns. Ch. Rep.* 197. *The State vs. Krebs*, 6 *Harr. and Johns.* 36.

Magruder, and *Alexander*, for the appellee.

1. A wife is not in *England* entitled to a provision out of a fund in chancery, as against the assignee of her husband, which the husband, the assignor, derived from her. 3 *Peter's Cond. Ch. Rep.* 305. *Mitford vs. Mitford*, 9 *Ves.* 100. The assignee stands in a better condition than the assignor, if it were not so, then upon the death of the husband, surviving the wife, she would be entitled to the *whole* by survivorship, which is not pretended. In the present case, the husband, at the date of the assignment, had the right to reduce the fund into possession, and the assignment operates as an agreement to reduce. The assignees did not go into chancery asking the aid of that court, but they were brought in. They argued that it was contrary to the practice of the Court of Chancery of *Maryland*, to allow a provision to the wife, under such circumstances as existed in this case; and as widows here, are placed upon more favorable grounds than in *England*, it would not be proper to adopt the practice of the courts there, if the rule be, as contended for on the other side. *Coomes vs. Clements*, 4 *Harr. and Johns.* 482. *Adams vs. Pierce*, 3 *Piere Wm's.* 11. 2. The application of the wife was too late, the court having by its order of 23d July, 1830, parted with the fund, and from that order, if erroneous, the appeal is not to be taken. *Howard vs. Moffatt*, 2 *Johns.* 209. After the various reports of the auditor, and their attification by the court, with directions that the money should be paid over by the administrators, in conformity therewith, they insisted the chancellor had no authority to interfere with the fund, which by those proceedings had passed from his jurisdiction. They further insisted, that the prayer of the petition was not warranted by the facts

stated in it. *Coop. Eq.* 96. *Mitf.* 74. And that *Richard* and *Grafton B. Duvall*, should have been made parties. *Coop. Eq.* 34. On the 2d point they cited, 2 *Kent. Com.* 113. *Honner vs. Morton*, 3 *Peters' Cond. Rep.* 298, 301. *Johnson vs. Johnson*, 1 *Jacob and Walker*, 456.

Johnson, in reply.

1. The fund being in court, and placed there at the instance of the distributees, the proper mode of asking relief was by petition, and the distributees alone were necessary parties; and as they were in court, it was not necessary to ask for process against them. *Cromwell vs. Maccubbin, et al*, 2 *Harr. and Gill*, 443. The endorsers, *Richard*, and *Grafton B. Duvall*, not having been parties to the original proceeding, should not have been made parties to the present petition, as no order upon it, could be binding upon them. They had no agency in procuring the assignment, and nothing more is presented, than the ordinary case, of an assignment by a debtor to his creditor, who is only required to use due diligence to render it available. The right of the wife to an equitable provision out of her estate, exists both against the husband and his assignee for value, whatever may be the effect of such assignment on the right by survivorship. *Roper on Property*, 266. *Jeremy*, 201. *Schuyler vs. Hoyle*, 5 *Johns. Ch. R.* 208. *Kenny vs. Udall*, *Ib.* 477. *Haviland vs. Myers*, 6 *Ib.* 25. *Udall vs. Kenny*, 3 *Cowen* 590. And chancery will always make this provision, when in possession of the fund, though the husband might have recovered it by an action at law. 2 *Kent. Com.* 118. *Udall vs. Kenny*, 3 *Cowen*, 590. The doctrine of allowing the wife a provision out of her estate, does not depend upon the relative favor shown married women, by the laws of *England*, or of this country. *Adams vs. Pierce*, 3 *Pier. Wm's.* 11. An application for such an allowance may be made by the wife, though the husband may not have asked the aid of the court to put him in possession of her estate. 2 *Kent. Com.* 118. *Johnson vs. Johnson*, 1 *Jacob and Walk.* 451. Though an assignment for value, may destroy the

wife's survivorship, so far as relates to the debt intended to be secured, it does not destroy it as regards the balance, if there be a balance after paying such debt, and therefore the petition should not have been dismissed. Now there is nothing in this case to show, that there would not have remained a residue after paying the debt to the bank, and the bill should have been retained for the purpose of ascertaining that fact. 2 *Atk.* 206. 3 *Russel*, 65. Upon the subject of the proper amount to be allowed, he referred to *Kenny vs. Udall*, 5 *Johns. C. R.* 479, 480. *Haviland vs. Bloom*, 6 *Ib.* 178.

ARCHER, J., delivered the opinion of the court.

The funds which in this cause, furnish the subject matter of contest, consisted of the personal estate of *Benjamin Harwood*, of whom the appellant, the widow of *Lewis Duvall*, was one of the representatives, and as such entitled to a distributive share. The appellant claims the fund yet remaining in court, by survivorship, or that a wife's equity may be decreed to her out of the fund.

The rule in equity appears to be, that where the aid of a court of equity is necessary to enable the husband to obtain possession of the wife's personal property, he must do what is equitable, by making a suitable provision out of it, for her maintenance and that of her children. This principle which regulates the Court of Chancery of *England*, is founded on those principles of natural justice and equity, which would seem to make it of universal application. For what could be more equitable than that a suitable provision should be secured to the wife and children, out of her choses in action, and what could be more inequitable than to permit the husband to take her whole estate, without allowing to her, out of her own funds, a suitable maintenance? Accordingly, the doctrine of the *English* Court of Chancery upon this subject, appears to have been adopted to the full extent in *New York*. *Howard vs. Moffatt*, 2 *Johns. Ch. R.* 207. *Schuyler vs. Hoyle*, 5 *Johns. Ib.* 207. *Kenny vs. Udall*, *Ib.* 464. *Glenn vs. Fisher*, 6 *Johns. Ib.* 33. *Haviland vs. Myers*, *Ib.* 25. 2 *Kent. Com.* 116.

That the laws of this State secure to the wife, one-third of the personal estate of the husband after his death, and after the payment of his debts, against the husband's alienation by last will and testament, cannot deprive her of this equity. In *England* it is not founded, as has been supposed in argument, upon the power of the husband to bequeath to others than his wife, his whole personal property, but upon the principle, that the husband seeking the intervention of a court of equity to gain possession of his wife's estate, must do equity. The wife's equity was by the practice of the *English* Chancery allowed her, at a period, when according to the decision of our own courts, in *Griffith vs. Griffith*, 4 *Harr. and McHen.* 101, and *Coomes vs. Clements*, 4 *Harr. and Johns*, 480, the common law of *England* forbade the husband to alienate the whole of his estate, as against her, and secured to her, as does ours, a third part of his personal estate after the payment of his debts. *Lord Hardwicke*, in *Jewson vs. Moulson* says, that in the 14th year of the reign of *Chas. I.* *Lord Keeper Coventry*, took notice of the rule, establishing the wife's equity, as existing at that day; at which period of time, according to *Sir Wm. Blackstone*, it was declared by *Sir Henry Finch*, that the husband had no power to devise away the whole of his property from the wife. That this was the common law of *England*, at that day, has been decided by the courts of this State. This equitable provision could not therefore have been founded, on any supposed power of the husband over the whole of his personal estate, but has been found to exist in *England*, under all the modifications which have existed in the rights, and powers of the husband over his property. It is true that this allowance to the wife, is the creature of the *English* Court of Chancery, and is considered as a part of its practice. But it is a wise provision growing out of salutary maxims governing courts of equity; and deserves to be considered, rather as a principle governing and controlling the court, in its dispensation of equitable jurisprudence, than as being merely practical in its

character. We are not aware that a different practice has existed in the equity courts of this State. It is possible that but a few applications of this kind have been made, and if this were the first case, it would be proper to apply to it a long and well established rule.

The wife's equity exists, although there has been an assignment for a valuable consideration, and the assignee standing in the place of the husband, and seeking to withdraw the funds, will be compelled to make the provision. He takes the assignment subject to the wife's equity, for he takes it with the knowledge, that it is property derived from her, and knows at the time of the assignment, or is bound to know, all the equity to which it is subject. It is an equity which attaches itself to the fund, and follows it in the hands of the assignee, whether with, or without a valuable consideration, or whether the assignment passes by the act of the party, or by operation of law. *Howard vs. Moffatt*, 2 Johns. Ch. Rep. 206. 1 Eden, 307, 371. 2 Atk. 420. *Wright vs. Morlay*, 11 Ves. 17. 1 Mad. Ch. 362. It has been supposed, that as a purchaser for a valuable consideration was looked upon by a court of equity with a favorable eye, that the provision for a wife, ought not to be enforced against such an assignee. *Wright vs. Morlay*, 11 Ves. 17. But the doctrine as above stated, notwithstanding this doubt, appears to be settled by a numerous succession of authorities. 2 Atk. 417. *Pryor vs. Hill*, 4 Bro. Ch. C. 138. *Pope vs. Crashaw*, 4 Bro. Ch. C. 326. *Lake vs. Beresford*, 3 Ves. 506. 4 Ib. 19. *Wright vs. Morlay*, 11 Ves. 17. *Wall vs. Bright*, 1 Jacob and Walk. 477. *Purdew vs. Jackson*, 1 Russel, 53. And in this country, the same judgment has been pronounced in several cases determined by chancellor *Kent*, in which all the authorities underwent an able and learned investigation. *Kenny vs. Udall*, 5 Johns. Ch. R. 318. *Haviland vs. Bloom*, 6 Ib. 178.

That there exists matter in the petition which would properly form the subject of an original bill, cannot, we think, furnish any serious obstacle to the appellant. It is sufficient

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that a portion of what she seeks, is demandable in the form of a petition. Now, if the fund in court, which is sought to be drawn out by the assignee, is liable to the appellant's equity, *the prayer that a suitable provision be made out of her share*, is properly cognizable by the court in this form; and the application of the appellant, that the administrators of *Benjamin Harwood* should not be permitted to pay over to the *Farmers Bank*, the funds in their hands for distribution, according to the order of 23d July, 1830, and that out of said funds, this provision should be assigned, made at the same term at which the order was passed, and before the money was paid over, brought properly before the chancellor, the whole subject matter of the order referred to, for his revision and review. It could not be necessary that a *subpœna* should be prayed against the parties. This was repudiated in the case of *McCubbin vs. Cromwell*. An order *nisi*, such as was passed in this case, was all that was necessary, and was according to the accustomed practice of the Chancery Court.

The parties interested in the fund were all in court. The administrators were parties to the suit, and the assignees were in court, seeking to draw from it, the funds in controversy. Nor could it be necessary in any possible view, which we can take of the case, to make *Richard and Grafton B. Duvall*, the endorsers of the assignor's note to the *Farmers Bank*, (and for the payment of which note the assignment was in part made,) parties. It is true, if ultimately available, it would have benefitted them, yet if the funds which are still in court, and have not yet been applied to the credit of the note, should be abstracted from its extinguishment, by a decree of the chancellor, it is perfectly clear, under such circumstances, that in any suit against the endorsers, the chancellor's decree would be a complete bar, to their claiming any credit on the note on account of the assignment, either at law or in equity, or setting up the same, against the right of recovery. The decree would not be liable to the objection of *res inter alios*

acta. So that a complete decree could pass without the appearance of the endorsers as parties.

It has been urged against the appellant, that having failed to file exceptions to the auditor's report, the application should have been to the chancellor to open the audit, so that she might have had an opportunity of filing her exceptions to the distribution. But we apprehend, that no formal order of the chancellor was necessary for opening the account, and granting leave to the appellant to file exceptions. The auditor made his report on the 22d of July; on the 23d, the order passes for a distribution, and the next day, and before the money is paid over, the appellant expresses her dissatisfaction with the distribution of the fund, and prays the chancellor, that a provision out of these funds may be made for her. This bringing as it does, the whole subject matter of the order of the 23d July, before the court, contains in substance and effect, an objection to the report upon which the order was founded; and the court in reviewing its own order, was thus necessarily called upon by the shape which the petition assumed, to re-examine the auditor's report, in as effectual a manner, as he could have been called to do, had he passed a formal order for re-opening the account.

The wife's right of survivorship, it perhaps is not necessary critically to examine. For it has not been alleged as at all probable, that any future dividends of this estate, would extinguish the claims of the *Farmers Bank*, according to the terms of the assignment, after the wife's equitable provision shall be abstracted therefrom; and because any claim to survivorship which she might have, would always be subject to the payment of the equitable assignee. The character and extent of the provision for the wife, would seem in every case, to be governed by its peculiar circumstances, and to be regulated by the whole of the wife's fortune, and what the husband had previously received. We have no other lights furnished us by the record upon this subject, than is contained in the auditor's reports, and when

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we consider the sums heretofore paid over of her fortune, to the assignees, we conceive the sum in the hands of the administrators according to the last report of the auditor, and which was distributed by the order of the 23d July, 1830, but a very inadequate provision. This we shall assign her for her maintenance, and that of her children, if she have any, with such further sum as the chancellor shall conceive proper, should more funds be brought into court for distribution.

The order therefore of the chancellor, of the 2d day of December, in the year 1830, so far as it dismisses the appellant's petition, is reversed, and this court proceeding to decree as the chancellor should have done, will pass an order directing the proceeds, at the date of the said order, in the hands of the administrators, to be paid over to the appellant, on account of her provision for her maintenance, and that of her children, if she have any.

DECREE REVERSED.

JOHN M. WYSE, *et al.* vs. SMITH AND BUCHANAN, AND
JOHN TESSIER.—*June, 1832.*

The personal estate of a deceased debtor is the natural fund for the payment of his debts ; and must, in ordinary cases, be first resorted to by the creditor for the satisfaction of his claim.

If personal assets come to the hands of the executor or administrator, sufficient to pay all the debts of the deceased, the creditor must look to that fund for the payment of his debts ; and if those assets are wasted, his remedy is on the official bond of the executor or administrator.

The real estate of the debtor is protected, unless the personal assets are insufficient ; and to authorise the chancellor to pass a decree, to sell the real estate, to pay the debts of the deceased, the bill must allege an insufficiency of personal assets for that purpose, which allegation must be admitted by the answers, or proved.

Where a will directed real estate to be sold, for the support and education of the testator's children, and a part of the personal estate which ought to have been applied in payment of debts, had been expended to educate and

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maintain the children, creditors might call upon a court of equity to sell the real estate, so directed to be sold, for the payment of the claims (qr.)

A personal, collateral security, given by an administrator, for a debt due by a deceased intestate, cannot operate to place the creditor in a better situation against the real estate of the deceased, than he would be without such security.

APPEAL from the Court of Chancery.

On the 15th of June, 1825, a bill was filed by the appellees, against the appellants, stating that on the 1st of June, 1811, a certain *William Wyse*, late of *Baltimore* county, deceased, was indebted to *Smith and Buchanan*, as co-partners in trade, in the sum of \$2737 48, for matters and articles properly chargeable in account. That being so indebted, the said *Wyse* departed this life in the year 1814, leaving several children, of whom some are minors, and that subsequently in the year 1820, the said *Smith and Buchanan* being indebted to *John Tessier*, in the sum of \$4500, assigned him, on account thereof, their aforesaid claim against *Wyse*. That said *Wyse*, by his last will, duly executed, a copy of which is exhibited with the bill, directs, "his wife and son *John*, in case of a deficiency of his estate to support and educate his children, that his real estate, known by the name of the *Deer Park*, be disposed of, for the maintenance of said children, under their direction, and management." That *Rachel Wyse*, the widow, (now deceased,) on the 12th of April, 1814, obtained letters of administration with the will annexed, on the estate of her husband, and settled with the Orphans Court, an account of his personal estate, on the 29th of June, 1816, a copy of which is also exhibited with the bill, by which there remained in her hands a balance of \$5712 34. That on the 16th of July, 1823, and after the death of *Rachel*, letters of administration *de bonis non*, on the estate of *William Wyse*, were granted to *Joseph Allender*, who returned an inventory of the estate, which came to his hands, (a copy of which is exhibited,) amounting to \$2293; and the complainants allege, that they have understood, and believe, that the difference between the balance appearing to be due the

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estate by the account of *Rachel Wyse*, and the inventory returned by *Allender*, was expended, in the maintenance, support and education, of the children of *William Wyse*. That some time after his death, his widow and son, petitioned for a decree, for the sale of his real estate, and on the 1st day of October, 1826, a decree for that purpose was obtained, which yet remains unexecuted. That petition, and proceedings upon it, are exhibited with the present bill. That *Rachel* the administratrix, always acknowledged the validity of the aforesaid claim, and being unable to pay the amount thereof in cash, she gave to the complainant *Tessier*, her bond, with *John M. Wyse* as her security, dated on or about the 22d of January, 1820, payable one year after date, conditioned for payment of \$4325, being the amount of principal and interest then due, with the distinct understanding however, that the estate of *Wyse*, was not thereby to be in any way discharged from its liability for said claim. That said bond not having been paid when due, suit was brought thereon, and judgment confessed, but owing to the loss of the cause of action, the judgment never could be extended, or rendered available. That on or about the 16th of May, 1822, *William A. Wyse*, one of the sons of *Wm. Wyse*, being indebted to one *George Riston*, in the sum of \$2000, for the purpose of securing the same, united with *Rachel*, the widow, *John M.* and *Eliza Wyse*, the children of *Wm. Wyse*, in a mortgage to *Riston*, of all their interests in the real and personal estate of the said *William*, an office copy of which mortgage is exhibited. *Prayer*, that the mortgage to *Riston* be set aside, and that the defendants, the children of *Wyse*, *Riston* and *Allender*, or such as may be liable therefor, be decreed to pay complainant's claim, or in default thereof, that the real and personal estate of said *Wyse*, be sold for that purpose, and for general relief.

The petition of *Rachel*, and *John M. Wyse*, for the sale of the estate of *William*, which is referred to in the bill, states, that the said *William*, by his will duly executed, di-

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rected that his lands in *Baltimore* county, called *Deer Park*, should be sold under the directions of the petitioners, for the maintenance and education of the testator's children, in case his personal estate should not be sufficient for that purpose. That the personal estate amounted to the sum of \$7005 25, and that the administratrix has disbursed of that sum \$1292 91, and that there is a claim now due *Smith and Buchanan*, amounting to the sum of \$ That out of the balance of the personal estate, there is to be deducted a commission to the administratrix, and her third as widow; leaving the other two-thirds for the support of the children, for which it is wholly inadequate, and that their interests and necessities required that the land called *Deer Park*, should be sold, and the petition therefore prays, that trustees be appointed to sell the same. *Kilty* (Chancellor,) on the 1st of October, 1816, passed a decree for the sale of the said land, and appointed the petitioners trustees to make the sale.

The answer of *George Riston*, admitted the death of *Wyse*, as stated in the bill, having first made the will, a copy of which is exhibited, and that his widow administered on, and took possession of his personal estate. That *Tessier*, one of the complainants, having presented to the said administratrix, whatever claim he had against her testator, she together with *John M. Wyse*, as her security, gave him their bond for the amount thereof, which this defendant has been informed, and believes, was accepted, in full discharge of his (*Tessier's*) claim against the estate. The defendant admitted the execution of the mortgage to him, as stated in the bill, and alleged the entire consideration therein stated, to be still unpaid. He insists that the whole of the property contained in the inventory returned by *Allender*, the administrator *de bonis non*, is comprehended in the mortgage to him; he does not admit, that the difference between the amount of that inventory, and the balance appearing to be in the hands of *Rachel*, the first administratrix, by the account exhibited by the complainants, was expended

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in supporting and educating the children of *William Wyse*, but supposes that the profits of the land and houses, were appropriated for that purpose.

The answer of *John M. Wyse*, admits the debt from *William Wyse* his father, to *Smith and Buchanan*, as the bill charges, and the execution of the bond by *Rachel*, the administratrix, and himself to *Tessier*, for the principal and interest of the said claim. That said bond was intended by the obligors, and received by *Tessier*, in full discharge of the account of *Smith and Buchanan*, against the estate, and that *Tessier*, in pursuance of such understanding, delivered him said account with a receipt thereon, to be by him handed over to the administratrix. This defendant admits, that *William Wyse* died seized of the real estate, mentioned in the bill, and that after his death an application was made for a decree to sell a part thereof. That about sixty acres were accordingly sold, and the proceeds appropriated to the benefit of the testator's children.

The answer of *Eliza Wyse*, *Margaretta Wyse*, *Wm. A. Wyse*, and the minors, *Edward*, *Nicholas*, *Matilda*, and *Francis Wyse*, say that they have no knowledge of the debt due from their father to *Smith and Buchanan*. They believe their father died seized of the lands mentioned in the bill, having first made his will, a copy of which is exhibited. The defendants, *Eliza*, *Margaretta Wyse*, and *Wm. A. Wyse*, do not admit, but deny that *Smith and Buchanan*, assigned their claim, whatever it may be, to *Tessier*, or that the latter has now, or ever had any claim upon the real estate which descended from their father to them. They believe that a portion of said real estate was sold under the decree mentioned in the bill, and that the proceeds, or a part thereof, was appropriated to the maintenance and education of themselves, and the other children of *William Wyse*.

The answer of *Allender* contains nothing material. A commission issued, under which proof was taken, and returned, establishing the validity of the claim of *Smith and*

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Buchanan, against *William Wyse* as stated in the bill, and that said claim was assigned by them, verbally, or in writing to *John Tessier*, in discharge of a debt to a larger amount due from *Smith and Buchanan* to him.

There was no evidence of a deficiency of the personal estate of the deceased to pay the debt, or that any portion of the personal estate had been applied to the support and education of his children.

The account of *Smith and Buchanan* against *Wyse*, was proved to have a receipt on it, and to have been allowed the administratrix in her settlement with the Orphans Court. The money however was not paid in fact.

BLAND, (Chancellor,) July term, 1830, decreed that *Alender*, the administrator *de bonis non*, should account for the personal estate of the deceased, and that his real estate should be sold for the payment of his debts, and appointed a trustee for that purpose.

From this decree the defendants appealed to the Court of Appeals.

The case was argued before MARTIN, ARCHER, and DORSEY, J.

A. C. Magruder and *Gwynn* for the appellants, contended,

1. That there were personal assets to pay the claim, and therefore, the real estate was not liable. 2. That the bill does not aver a deficiency of the personality, and is consequently defective. *Hoye vs. Brewer and Troup*, 3 *Gill and Johns*. 153. 2. If the complainants ever had a claim as against the real estate, they had lost it, by taking the bond of the administratrix with security, and giving her such a receipt, as enabled her to get a credit for the amount in the Orphans Court. 4. The complainants have forfeited their remedy against the real estate, (if they ever had any) by delaying to proceed, until the bond of the administratrix became barred by limitations. If they had prosecuted their claim against the administrators in due season, satisfaction might have been had out of the personality, which originally was

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amply sufficient for that purpose ; having failed to do so, and allowed the administrators to waste the assets, and precluded a recovery on their bond, it would be unjust, especially as regards the infant heirs, to charge the real estate, when the creditor by his negligence, has permitted the fund primarily liable to him, to be placed not only beyond his reach, but beyond the reach of the heirs, if they should be made to pay the claim. They cited, 1 *Chitty Eq. Dig.* 277. *Thompson vs. Tappen*, 5 *Johns. Ch. Rep.* 518.

Scott, and *Johnson*, for the appellees.

Upon the death of *Wm. Wyse*, there was due from him to *Smith and Buchanan* upwards of \$2000, and from the latter to *John Tessier*, upwards of \$3000, no part of which has been paid, notwithstanding the receipt, and allowance of the account by the Orphans Court. The receipt was given merely to enable the administratrix to get a credit in the Orphans Court, as is manifest from the evidence. *Tessier* in taking the bond, did not mean to discharge the estate, his object being to liquidate the claim, and to superadd to his security the personal responsibility of the obligors. The bill distinctly alleges the fact, that the bond was taken as cumulative security, and it is denied by only one of the defendants. To show that a creditor does not lose his remedy against the deceased's estate by taking the note of his administrator, they referred to *Glenn vs. Smith*, 2 *Gill and Johns.* 493. It can make no difference in this case, that a bond was taken for a simple contract debt, because it was the bond of the administratrix, to whose bond as such, this creditor had a right to resort ; it is the case therefore of bond for bond. They insisted, that as the inventory of *Allender*, the administrator *de bonis non*, showed a deficiency of the personal estate, the whole real estate was liable to be sold, to make up that deficiency : but if the whole was not liable at all events, that portion of the realty was, which descended to the obligors in the bond.

MARTIN, J., delivered the opinion of the court.

The bill in this case was filed to obtain a decree for the sale of the real and personal estate of *William Wyse*, deceased, to pay a debt originally due to *Smith and Buchanan*, and alleged to have been assigned by them to *John Tessier*.

The chancellor has not stated the grounds upon which he founded this decree, and upon a careful examination of the record, we cannot think the complainants are entitled to it.

The personal estate of a deceased debtor, is the natural fund for the payment of his debts, and must *in ordinary cases*, be first resorted to, by the creditor for the satisfaction of his claim.

If personal assets come to the hands of the executor, or administrator, sufficient to pay *all* the debts of the deceased, the creditor must look to that fund for the payment of his debts, and if those assets are wasted, his remedy is on the official bond of the executor, or administrator. The real estate of the debtor is protected unless the personal assets are insufficient, and to authorise the chancellor to pass a decree to sell the real estate to pay the debts of the deceased, the bill must allege an insufficiency of personal assets for that purpose, and must sustain that allegation by proof, or the admission of the opposite party. See Act of 1785, *ch.* 72. We cannot therefore sustain this decree under the act of 1785, because the bill does not allege an insufficiency of personal assets to pay the debts, and if alleged, the complainants by their own showing, disprove the allegation. By exhibit E, *filed by the complainants*, it appears that *Rachel Wyse*, the administratrix with the will annexed, of *William Wyse*, had on the 29th of June, 1816, a balance in her hands of \$5712 34, and the only debt then due from the estate, (so far as can be collected from this record,) was the one now in controversy, to *Smith and Buchanan*, which *then* amounted to but little more than one half of that sum.

It is stated in the bill that it is directed by the will of

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William Wyse, that a part of his real estate called *Deer Park*, should be disposed of for the maintenance of his children, if the personal estate should be insufficient for that purpose, and that the difference in the amount of assets, admitted to have been in the hands of the administratrix, on the 29th of June, 1816, and that returned by the administrator *de bonis non*, in the 23d January, 1824, was produced by applying the money to the education and maintenance of the children, and that a decree was obtained to sell *Deer Park* for the purposes of the will, but that it remains unexecuted.

If a part of the personal assets which ought to have been applied to the payment of this debt, had been expended to educate and maintain the children, to save the real estate, it would have merited the serious consideration of this court, but although such is the allegation in the bill, it is not admitted by any of the answers, and there is no attempt on the part of the complainants to sustain it. *George Riston* in his answer says, "he does not and cannot admit, that the difference between the balance of *Rachel Wyse's* administration account, and the assets returned by *Joseph Allender*, was expended in maintaining, supporting, or educating said children, but supposes and believes, that the profits of the farms, and rent of the houses in town, were appropriated for that purpose." The other answers are silent as to the manner in which the assets have been expended, but state, that part of the real estate had been sold, and the proceeds of the sale applied to the maintenance, and education of the children. *Eliza* and *Margaretta Wyse* say, "they have been informed, and believe that a part of the real estate of their father, was sold after his death, by virtue of the decree mentioned by the complainants, and the proceeds of such sale, or a part thereof, was applied to the maintenance and education of these defendants, and the other children of *William Wyse*, deceased." *John M. Wyse* says, "a part of the land decreed to be sold, about 70 acres, was sold, and the money arising therefrom, was appropriated to the benefit of the children of *William Wyse*, deceased."

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The answer of *William A. Wyse*, asserts the same facts. This allegation then, not being admitted by any of the defendants, and denied by one, it was incumbent on the complainants to sustain it by proof, and we have looked in vain to this record for such proof. The only evidence that looks to this question produced by the complainants, is the petition of *Rachel*, and *John M. Wyse*, to obtain a decree for the sale of *Deer Park*, under the will of *William Wyse*, which so far from sustaining the idea, that the personal assets had been expended by her in maintaining the children, that she repels it, by stating how a part of those assets had been expended, and the manner the balance was to be appropriated—that she had already paid \$1292 91—that there was a claim amounting to \$ due to *Smith and Buchanan*, and that out of the balance then due to the estate, was to be deducted her commissions, and her third part as widow of the deceased, leaving two-thirds of the net balance for the support of the children of *William Wyse*. We therefore think the complainants have not shown themselves entitled to a decree, for the sale of the real estate of *William Wyse*, to discharge the claim set out in this record.

With this view of the case, the court deem it unnecessary to inquire, whether the alleged assignment, by *Smith and Buchanan*, of their claim to *Tessier* was proved, or what was the legal effect of the bond passed by *Rachel Wyse*, and *John M. Wyse*, to him.

If this bond did not extinguish the debt, as against the estate of *William Wyse*, (of which we do not intend to give an opinion,) it certainly could not give *Tessier* any claim against the real estate of the deceased, that he did not before possess. A personal collateral security, given by the administratrix, for a debt due by the deceased testator, cannot operate to place a creditor in a better situation against the real estate of the deceased, than he was in without such security.

DECREE REVERSED, AND BILL DISMISSED WITH COSTS.

MARTIN GEISER use of JOHN KNAVAL *vs.* SAMUEL KERSHNER.—June, 1832.

K gave G his single bill for \$100, which was assigned to I. The bill being due, and several years' interest having accrued upon it, K on the 3d April, gave an agent of I's an order on M for \$90 76, payable on the 1st of May. The agent proved, that he received this order to be a payment, provided M accepted it; that if it was not accepted, it was to be returned to K's brother-in-law, who lived in the neighborhood. M refused to accept the order, and some two or three months after, the agent offered to deliver the note to the brother-in-law, who declined receiving it. **HELD**, that this order was not a payment, and that K was not entitled to notice of its non-acceptance, or non-payment, the terms of the contract being a waiver of the right to notice.

The general rule is well settled, that the payment of a less sum of money than the whole debt, without a release, is no satisfaction of the plaintiff's claim. A mere agreement to accept less than the real debt, is a *nudum pactum*.

APPEAL from Washington County Court.

This was an action of *Debt*, instituted by the appellant against the appellee, on the 26th of April, 1827, on the following single bill. "Four years after date, we, or either of us promise to pay or cause to be paid unto *Martin Geiser*, or order, the just and full sum of one hundred dollars current money, for value received, as witness our hands and seals, the 26th day of May, 1817. *Samuel Kershner*, (Seal.) *Michael Householder*, (Seal.)" May 2, 1818, I assign all my right in this note to *John Knaval*, for value received. *Martin Geiser*, (Seal.)

The defendant pleaded payment to the assignee, and accord and satisfaction; to which, by agreement of counsel in the Court of Appeals, replications were considered as filed, and the issues as having been regularly made up, before the finding of the jury.

At the trial of the cause, the plaintiff having read to the jury the above single bill, with the assignment upon it, the defendant proved by *Jacob Kershner*, a competent witness, that the defendant, on the 3d of April, 1824, gave to

Benjamin Ferrel, the agent of the plaintiff, the following order—"April 3d, 1824. Mr. *Jeremiah Mason*, Sir—Please to pay to *Benjamin Ferrel*, the sum of ninety dollars and seventy-six cents, against the first of May next, by so doing you will oblige me. *Samuel Kershner*;" towards the payment of the said single bill, but the witness did not know on what terms said order was received.

The plaintiff then proved by *Ferrel*, that he was the agent of the plaintiff, and that he received the said order, to be in payment of the said single bill, provided *Mason* accepted it, and that if it was not accepted, it was to be returned to *Jacob Kershner*, the defendant's brother, who lived in the neighborhood. That before it became due, he called on *Mason*, who refused to accept it, but said there was an unsettled account between him and the defendant, on an agreement for the purchase of timber, and he had not received the whole of it, but that whatever was due to defendant, he would pay to *Knaval*. That the witness some time afterwards, perhaps two or three months, called on *Jacob Kershner*, and told him, that *Mason* had refused to accept the order, and offered to return it to him, but he refused to receive it. The defendant then proved by *Mason*, that when *Ferrel* called on him with the order, which was the last of July, he did refuse to accept it, and told him, he thought the order was for more than was due the defendant. That there was something due him; that the account between himself and the defendant was unsettled. That he had not received all the timber he was to get from the defendant, and that he apprehended there would be a dispute about it; but that whatever should be due on settlement between him and the defendant, he would pay the plaintiff. That he never has had a final settlement with the defendant, and never did make any payment to the plaintiff—and the witness says he thinks there was a balance of about \$90 due from him to the defendant, at the time the order was presented.

The defendant then prayed the court to instruct the jury, that if they find from the evidence, that the defendant had not due notice of the non-acceptance, and non-payment of the said order, the plaintiff is not entitled to recover; which instruction the court (SHRIVER, and THOMAS BUCHANAN, A. J.) gave, and further instructed the jury, that the notice after the expiration of two or three months was not due and reasonable notice.

The plaintiff excepted, and the verdict and judgment being against him, he appealed to this court.

The cause came on to be argued before MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Anderson, for the appellant, contended,

1. That the defendant's evidence was not sufficient, under either plea, to bar the plaintiff's recovery; and at most could but show an assignment to the amount of the order. 5 *Coke. Rep.* 117. 5 *East.* 230. *Peake Ev.* 249. 6 *Harr. and Johns.* 169. 1 *Bac. Abr.* 45. 2 *Wil. Rep.* 86. 6 *Coke. Rep.* 44.

2. There was no payment at all; 1st, because the agent had no authority to receive the order in discharge of the single bill—and 2d, because it was not accepted by *Mason*, according to the terms on which it was received. 2 *Stark Ev.* 583. 3 *Ib.* 1087. *Ward vs. Evans*, 2 *L. Ray.* 930.

3. That according to those terms the defendant was not entitled to notice at all, of the non-acceptance, and non-payment of the order.

Price, for the appellee.

1. The pleas of the defendant, if deemed insufficient, should have been demurred to, and as that was not done, no question upon their sufficiency can be raised here.

2. Although it is true, that an order, in ordinary cases, will not extinguish a pre-existing debt of a higher nature,

it will have that effect, if there be an agreement for that purpose, as is the case here. 5 *Johns. Rep.* 72.

3. The only question in reference to notice, was whether the defendant had due notice—whether he was entitled to notice at all, is a point not raised.

MARTIN, J., delivered the opinion of the court.

The record in this case has been amended by consent. Replications are considered to have been filed to the pleas, and issues made up for the jury.

This case is within a very narrow compass, the act of 1825 confining the appellate court to the points decided by the court below.

To an action of debt on a single bill for \$100, dated the 26th of May, 1817, the defendant relied on two pleas—payment to the assignee of the bill; and accord and satisfaction.

To sustain the second plea, evidence was offered to the jury, that the defendant, on the 3d of April, 1824, gave to *Benjamin Ferrel*, the agent of *Knaval* the assignee, an order on *Jeremiah Mason* for the sum of \$90 76, towards the payment of the single bill, on which this action was instituted. That the said order was received by the agent, to be in payment of the bill, provided *Mason* accepted it, but if it was not accepted, it was *to be returned to Jacob Kershner, the brother of the defendant*. *Mason* did refuse to accept it, and the agent afterwards, perhaps in the course of two or three months, informed *Jacob Kershner* of it, and offered to return it to him, but he refused to receive it.

The court puts the plaintiff's right to recover upon the notice *he was bound to give to the defendant*, of the non-acceptance, and non-payment of the order. They say in substance, that if the jury believe the evidence, the defendant had not due notice, and therefore the plaintiff cannot recover. It appears to this court, that whether the defendant had, or had not notice, could not affect the plaintiff's right to recover in this case.

The contract between the parties—the terms upon which the order was given, and received, was a waiver of ordinary notice to the defendant. The order was not to be considered as affecting the plaintiff's claim unless it was accepted, and if not accepted, no notice was required to be given to the defendant, but the order was to be returned to *Jacob Kershner*, his brother. The question whether the order was returned to the brother in due time, according to the terms of the agreement, is not presented; but the court say, the plaintiff is not entitled to recover, because the defendant had not due notice, &c. Suppose on the day *Mason* refused to accept the order, it had been returned to *Jacob Kershner*, in strict compliance with the agreement of the parties, upon what principle could it be said, the plaintiff was in default? He had done all the agreement required him to do, and yet, according to the opinion expressed by the court, he would not be entitled to recover, because the defendant had not notice of it.

Let us take another view of this case. The court says the plaintiff is not entitled to recover, because due notice was not given to the defendant. Suppose no notice had been given to him, and there never had been an offer to return the order to *Jacob Kershner*; would the facts as set out in the plea of accord and satisfaction be a legal bar to the plaintiff's claim?

The cause of action as before stated, was a single bill, under seal for \$100, and the money *had been due*, for several years; when, as the plea states, an order was given for \$90 76, and accepted by the plaintiff, in full satisfaction of his debt, principal and interest. It is an attempt then, to discharge a debt of \$100, with interest on that sum for several years, by the payment of \$90 76, because the plaintiff agreed to accept it in satisfaction.

In *Fitch vs. Sutton*, 5 *East*. 230, it was determined, that the acceptance of a less, cannot be a satisfaction in law, of a greater sum *then due*—nor can it operate as an extinguishment of the original cause of action. *Lord Ellenbo-*

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rough says, it is impossible to contend, that the acceptance of £17 10, is an extinguishment of a debt of £50. There must be some consideration for the relinquishment of the residue ; something *collateral*, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*. Many cases might be adduced to sustain this doctrine—11 *East*. 390, *Lord Ellenborough* says, “It is true, that if a creditor simply agree to accept less from his debtor than his just demand, that it will not bind him,” &c. In 17 *Johns*. 174, *Spencer, Ch. J.* declares the cases of *Harrison vs. Wilcox and Close*, 2 *Johns. Rep.* 449. *Fitch vs. Sutton* 5 *East*. 232, and *Cumber vs. Wane*, 1 *Strange*, 426, are decided authorities to show, that the payment of a less sum of money than the real debt, will be no satisfaction of a larger sum, without a release by deed. In *Boyd vs. Hitchcock*, 20 *Johns. Rep.* 75, Justice *Platt*, who delivered the opinion of the court, fully recognizes this to be established law. He says, the question is, whether the third plea sets out such an accord and satisfaction as will bar the action?

The general rule is well settled, that the payment of a less sum of money than the whole debt, without a release, is no satisfaction of the plaintiff's claim. A mere agreement to accept less than the real debt, would be *nudum pactum*.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

SMITH, SURVIVING PARTNER OF SMITH AND LANE, vs.
STONE AND MULLIKIN, *June*, 1832.

One partner cannot bind another by deed, yet he may execute a release under seal in the partnership name, which will discharge a debtor to the partnership.

Where debtors transferred property in trust for the benefit of creditors, who agreed to accept their respective proportions of the estate conveyed, and in consideration thereof, released the debtors from all liability, in an action by one of the creditors against the debtors, it is not competent for the

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plaintiff to show, in order to avoid the release, either, that one of the defendants had represented to the witness, (who was a creditor,) that the creditors generally, had consented to sign the release, and that he (the witness,) had executed it under that impression, or, that one of the creditors had refused to execute the release, and the defendants in order to induce him to sign it, had secretly agreed to pay him, and did pay him, without the knowledge of the other creditors, an additional consideration. Such evidence does not establish any fraud.

When there is an understanding, that all the creditors of a particular debtor are to sign a deed of release, upon certain conditions, and to receive nothing beyond their proportions of the trust fund, or that the deed should be void, any underhand agreement to pay more, would have been a breach of faith, and a violation of the principles of morality and fair dealing.

APPEAL from *Baltimore County Court.*

Assumpsit by the appellant *William Smith*, as surviving partner of *James S. Lane*, and *John Smith*, trading under the firm of *James S. Lane and Smiths*, against the appellees, trading under the firm of *James Stone, Jr. & Co.*, on a promissory note, the execution of which, by the defendants was admitted, dated 20th December, 1821, at six months, for \$193 75. Issue was joined upon the plea of *non assumpsit*.

1. At the trial, the defendants having read to the jury a deed, dated 27th July, 1822, executed by them, to trustees, of all their partnership property, and effects, for the purpose of applying the proceeds of the same, among those of their creditors, who should within three months from the date thereof, execute to them a full and final release and discharge from any claim and demand, they might respectively have upon them; offered to read to the jury the following paper. "We, the several persons who have hereunto subscribed our names, creditors of *Benjamin H. Mullikin*, and *James Stone, Junior*, lately trading under the firm of *J. S. Jr. & Co.*, send greeting: Whereas the said *B. H. M.* and *J. S. Jr.*, by deed bearing date the 27th day of July, instant, and intended to be recorded, have conveyed unto *Alexander Fridge*, *John Gibson* and *Thomas W. Hall*, their heirs, &c. all and singular the joint estates, effects and property, real and personal, of them the said *B.*

H. M. and *J. S. Jr.*, and also all debts and sums of money due or owing to them in their joint or co-partnership capacity aforesaid, to hold, receive, and take the same, and to dispose thereof for the benefit of the creditors of the said firm of *J. S. Jr. & Co.*, in the manner and upon the terms and conditions in the same deed expressed and set forth. And whereas the said *J. S. Jr.*, individually, by deed of even date with the one above referred to, and intended to be recorded, hath conveyed, assigned and transferred, to the same trustees, certain real and personal estate, specified in a schedule annexed to said last mentioned deed, and subscribed by the said *J. S. Jr.*, to hold to the said trustees, for the like purposes with those expressed in the aforesaid deed first mentioned, as by reference to said deeds may more fully and at large appear. We have therefore agreed, and do hereby agree to accept of our respective shares and proportions of the property, estate, effects, and debts, so as aforesaid conveyed and transferred by the said *B. H. M.* and *J. S. Jr.*, jointly, and the said *J. S. Jr.*, individually, to the said *A. F.*, *J. G.* and *T. W. H.*, in full satisfaction of the debts and sums of money owing to us respectively, at the time of the signing and sealing hereof, by or from the said *B. H. M.* and *J. S. Jr.*, in their co-partnership capacity aforesaid; hereby declaring our assent to and approbation of, as well the aforesaid deeds of trust, as the provision by them made for the discharge of our respective claims. Now therefore, know ye, that for the consideration aforesaid, each of us the said creditors, who have hereunto set our hands and seals, for himself, his heirs, executors and co-partners, doth by these presents remise, release, and forever discharge the said *B. H. M.* and *J. S. Jr.*, their heirs, &c. of and from, all and all manner of action and actions, suit or suits, claims and demands whatsoever, which against the said *B. H. M.* and *J. S. Jr.*, or either of them, each and every one of us, their said creditors, now have, or which each and every of our heirs, executors or administrators respectively, hereafter may, can or ought to have, for

or by reason of our respective debts, to us severally due or owing from the said firm of *J. S. Jr. & Co.*, in anywise howsoever. In testimony whereof, we have severally subscribed our names, and affixed our seals, this 29th day of July, 1822.”

And offered evidence to the jury, that the said instrument of writing was signed “*Lane and Smiths*,” sealed and delivered by *John Smith*, one of the partners of the firm of *Lane and Smiths*, in the name of the said firm of *Lane and Smiths*, but without any authority for that purpose from either of the other partners, except so far as the said authority was incident to the character and power of a partner. The plaintiff objected to the admissibility of the said instrument of writing or release, on the ground that it was not the deed of the plaintiff, or of the firm of *James S. Lane and Smiths*, or of any person constituting one of that firm; but the court (*Hanson and Kell, A. J.*) overruled the said objection, and allowed the said instrument of writing to be given in evidence to the jury. The plaintiff excepted.

2. The plaintiff, after the evidence stated in the first bill of exceptions, (which is to be taken as a part of this exception,) had been given to the jury, offered to prove by *Thomas W. Hall*, that he, as one of the firm of *T. W. and C. A. Hall*, creditors of the defendants, had executed the release mentioned in the first bill of exceptions, before the said release was signed by *John Smith*, the deceased partner of the plaintiff, as stated in the said first exceptions; that *James Stone, Jr.* one of the defendants, had represented to him that the creditors generally had consented to sign the said release, and that the witness had executed it under that impression. And the plaintiff further offered to prove by the said *Hall*, and by *Henry Beadell*, a competent witness, that one of the said creditors had refused to execute the said release, and the defendants, in order to induce him to sign it, had secretly agreed to pay him, and actually did pay the said creditor, without the knowledge of the other creditors, an additional consideration, to wit, *seventy-five per*

centum of his whole claim, which the plaintiff contended was a misrepresentation, and in law a fraud by defendants practised on the rest of the creditors, and renders the said release void and inoperative as to the plaintiff; but the court refused to permit the said testimony to be given to the jury. The plaintiff excepted, and verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before EARLE, MARTIN, STEPHEN, and DORSEY, J.

Lloyd, for the appellant.

1. It is a settled principle of law, that *one partner* cannot bind the *firm* by *deed*, no matter what consideration passes, *unless a special authority under seal be given him for that purpose*; or unless the other partners be present at the execution and assent thereto. *Harrison vs. Jackson et al.* 7 Term. Rep. 207. *Ball. vs. Dunsterville, et al.* 4 T. R. 313. The deed in question, not being stated to have been executed in the presence, or with the knowledge of the other members of the firm, and there being no special authority, is clearly therefore *not the deed of the firm*. But it is said, that the case of a *release* is an exception to the rule: that though such release is *not the deed of the firm*, yet it is the deed of the individual member who executes it, and is obligatory on the firm. It is true, that the books make this distinction, and it is on the principle, that a release by one joint obligee, is an extinguishment of the debt. *Gow. on Partnership* 83, 84-5-6-7. *Mont. on Composition*, 15. This exception as before stated, is made on the ground, that the instrument of release, though not the deed of all the partners, *is the deed of the particular individual of the firm, who executed it*. Therefore, I apprehend, that unless it can be shown, that the instrument in question *can operate as the deed, and is the deed of John Smith*, it is no bar to the plaintiff's suit. Is it then the deed of *John Smith*? It will be observed, that the instrument purports

on its face to be the deed of those "*who have thereunto severally subscribed their names, and affixed their seals,*" and that the name of *John Smith*, does not appear in *any part* of it. The only name, or names, subscribed by *John Smith*, according to the proof, are the names "*Lane and Smiths.*" Is this then the name of *John Smith*? Can *parol* evidence be admitted to show, that a certain person by name, *John Smith*, subscribed the names "*Lane and Smiths,*" and affixed a seal thereto, when the deed on its face purports to contain the names of the several persons who executed it? By the admission of such evidence will the court say, that although the deed on its face shows the *surnames* of two or three persons, with one seal affixed, and although such surnames do not identify any individual yet that in fact it is the deed of a particular person? And will the court do this, when the surname subscribed to the instrument does not even correspond with the surname of the person who is said by the *parol* evidence to have executed it? The names subscribed are "*Lane and Smiths,*" the person, who is proved to have subscribed them, is named *John Smith*. It is a principle of law, that a deed must on its face distinguish with reasonable certainty the person who is the grantor, and the person who is the grantee: and if the deed does not so distinguish, it is void for uncertainty, as it would be for uncertainty in the description of the thing granted. *Shep. Touch.* 233-4. 10 *Co. Rep.* 123-4, and the cases there cited. Can any one from an inspection of this instrument say, that there is any certainty as to the grantor? And if *parol* evidence may be adduced to show, that *John Smith* subscribed the names "*Lane and Smiths,* and it may thence be inferred, that the instrument is the deed of *John Smith*, might it not with equal reason, and on the same principle, be allowed, that *parol* evidence shall be introduced to show, that a deed purporting on its face to be the deed of *Robert Rogers* is in fact the deed of *Thomas Rogers*? Yet the books all say, that a *mistake* in the *Christian* name of the grantor, or

grantee *avoids* the deed. And the same books say that the *omission* of the *Christian* name avoids the deed, which is the fact in the present instance. *Comyn. Dig. Tit. "Grant."* (A. 2.) lays it down expressly, that "a *mistake* of the *Christian* name of a grantor or grantee *shall not be supplied.*" Again—*Bac. Abrid. "Grant"* (C.) "It seems by the better opinion of the books, that a *mistake* of the *Christian* name will *vitate* the grant: as when the grant is *without any Christian name at all*, or where a *wrong name* is made use of, as *Edmund* for *Edward.*" Also, in *Shepard's Touchstone*, 233–4, after stating that the names of the persons in grants are set down to distinguish them, and to make the person intended *certain*; that it is best to describe the person by his true and proper name of baptism, and also by his surname; and if it be a corporation, by the true name whereby the corporation is made, "yet (it is added,) mistakes in this case, unless they be very gross, will not make void the grant. "*Nihil facit error nominis cum de corpore constat.*" But the author shows afterwards by the cases which he states, what he means here by a *very gross mistake*: for, in the same paragraph he says, "But if an *ordinary man* grant by his surname only, without any name of baptism, or by his name of baptism, without any surname at all; *in these, and such like cases*, for the most part, *the grant will be void for uncertainty*: unless there be *some other matter in the deed to help it*, or some matter done *ex post facto* to supply it: for in some cases, where the thing granted doth lie in livery, such a mistake or uncertainty in the grant may be holpen by the livery of seisin upon the deed afterwards." *Shep. Touchs.* 233–4 "*Grant.*" *ad id.* 4 *Cru. Dig.* 35. "*Deed.*" Now, in the case before the court, there is no *Christian* name, neither does the surname subscribed to the instrument correspond with the surname in the parol evidence—and there is *no other matter in the deed* to help it, neither is there any matter done "*ex post facto*," to supply the uncertainty. So also in the case of the *Mayor and*

Burgesses of Linne, 10 Co. Rep. 123, a. which was an action on a bond given by *John Pain* to the *Mayor, &c. of Linne*, by the name of "*Majoris et Burgensium de Linne Regis*," it was in proof that the grantees were incorporated by the name "*Majoris et Burgensium burgi domini regis de Linne regis*," and an objection was made by defendant's counsel, that the bond was void on account of the misnomer of the grantee. The court held in that case, (after it had been oftentimes argued at the Bar (p. 123 a.) that the variance was only "*in syllabis et verbis*," and not "*in sensu et re ipsa*," and therefore, not material. (p. 125 a.) *Coke adds*, (p. 125-6) "so that the name in the bond by matter apparent therein imports a sufficient certain demonstration of the true name of the incorporation." And it will be found, as well by the principles applied by the court to that case, as by the cases therein cited and approved, that the decided cases go at least as far as the positions above laid down by *Comyn and Sheppard*, and followed by *Bacon* and *Cruise*. The case of 10 Co. R. 123, is a case of uncertainty in the name of the grantee, but the principles equally apply to the case of the grantor, as may be seen from the case of the "*Eaton College*" therein cited (p. 124 a) and admitted to be of authority. *Vid. et Moor.* 13, 1 *Anders.* 23, *Dyer* 150, pl 84, 1 *Leon* 159. From all these authorities, I think it clear, that it is material in law, that the grantor should be named. Is there any grantor named here? From the same authorities, (particularly *Shep. Touchs.* 234, and 10 Co. R. 125 a. b.) it seems equally clear, that the name must be certain from matter apparent in the deed itself; and that parol evidence cannot be introduced to supply the defect in this respect. *Comyn Dig. "Grant"* (A 2) says expressly "a mistake in the *Christian* name of the grantor, or grantee shall not be supplied." Is there any matter apparent in the deed itself here, which (to use the words of 10 Co. R. 125 a. b.) "imports a sufficient certain demonstration of the true name of the grantor?" It certainly cannot be pretended that there

is *any Christian* name here—and an *omission*, according to the same books, is *equally fatal* with a *mistake*: and moreover as I have before stated, the surname proved by the parol evidence, even if such evidence was admissible, does not correspond with the name subscribed to the instrument before the court.

If then these authorities are to be relied on, the instrument in question is not the *deed* of the firm, neither is it the deed of *John Smith*. If it cannot operate as a deed, it cannot operate at all against the plaintiff in this case. For it is clearly the *deed* of *John Gibson* and of several others, who it appears have duly executed it. The same instrument cannot operate as the *deed* of *one* person, and the parol agreement of *another*, as a deed for one purpose, and not a deed for another, and that too, when it purports on its face to be a deed. But if it were held to be a *discharge not under seal*, yet it would not be a bar to the plaintiff's suit in this case. It will be observed, that the debt, for which this suit is instituted, *was due* at the time of the signing of the instrument of writing in question. *Watson on Part. 234*. "A promise, *before* it is broken, may be discharged by a *parol* agreement: but *after* it is broken, it *cannot be discharged without deed*, by any new agreement without satisfaction." Again—this instrument does not purport to be in consideration of full satisfaction, but of the shares, which may come to each creditor. In *Fitch vs. Sutton*, 5 East. 230, it was expressly decided, "that where a less sum than the whole demand was paid, and agreed to be received, in satisfaction of the claim, the acceptance of the less sum is no discharge of the debt, *unless it is done by deed*; and in that case, the plaintiff recovered the balance, *the discharge not being under seal*. *Ad id. Cumber vs. Wane*, 1 Stra. R. 426, *vid. et Pinnel's case*, 3 Co. R. 118. For these reasons we think the court below erred in the decision in the first bill of exceptions.

2. On the 2d bill of exceptions. In *Cooling vs. Noyes*, 6 Term. Rep. 263, it was decided, that if a

debtor represents to one of his creditors, that if he will agree to accept a composition for his debt, all the other creditors will do the same, and such creditor do agree to accept it in consequence of such representation, the agreement is not binding on the said creditor, if the representation be untrue. Again—In *Child vs. Danbridge*, 2 Vern. 71, it was held, that a *secret agreement*, to pay some of the creditors in full, *was a fraud on the rest*; and the court on that ground, refused the debtor the relief prayed. And *Small vs. Brackley*, 2 Vern. 602, is to the same effect. *Doe. vs. Anderson*, 5 M. and Selw. 161, decides, that where a party executes a *release under seal*, with an ignorance and concealment of important facts, *he is not bound by it*. BAYLEY, J., says “I do not see any reason why the plaintiff should have gone on under a deed, executed in ignorance, and under concealment. The bankrupt was *guilty of a fraud*, by concealing, instead of disclosing an act of bankruptcy, which distinguishes the case from *Bamford vs. Baron*.” See also *Montague ou Composition*, 32. And how, I would ask, do the courts in these cases ascertain that there has been a fraudulent representation, if the party against whom the agreement or release is produced, may not be permitted to offer parol proof of such fraud? Yet here such proof was rejected.

In conclusion I will add, that the present case does not come within the principle of that class of cases, in which it has been held, “that if the plaintiff by signing a composition induced others to sign, he cannot afterwards sue for his whole debt, because it would be a *fraud* on those *who signed after him*.” Because in the present case, there was a *fraud* practised on *all the parties signing*, the plaintiff, as well as those who signed after him. The *latter* therefore, are *not bound* by the release, any more than the *former*, and any of them may sue. Whereas in the cases in which the above principle was applied, it will be found, that there was *no fraud on the part of the debtor*, and consequently, *the other creditors were bound by the composi-*

tion, and the plaintiff in those cases, wished to take advantage of certain circumstances *peculiar to his own case*, which avoided his release to the defendant, while he left the other creditors (*whom he had induced to sign*) without the benefit of the consideration they had contemplated, to wit, the discharge of the defendant, or a certain amount of composition money.

No counsel argued for the appellees.

STEPHEN, J., delivered the opinion of the court.

This action of *assumpsit* was brought upon a promissory note, executed by *Stone and Mullikin*, to *Lane and Smith*, in the course of the trial of which, two bills of exception were taken to the opinions of the court below. The defendants to support the issue of *non assumpsit* by them pleaded, gave in evidence to the jury, a deed of trust executed by them, by which they conveyed certain real estate and all their partnership property of every description, to certain trustees for the benefit of such of their creditors, as should within a limited time, give them a final discharge from the payment of their respective claims. In conformity with the provisions of this deed of trust, several of the creditors of *Stone and Mullikin* executed a deed of release, and among the number it was executed by *John Smith*, one of the partners of *Lane and Smith*, by the name of the firm of "*Lane and Smith*." To the admissibility of this release as evidence in the cause, the plaintiff by his counsel objected, upon the ground, "that it was not the deed of the plaintiff, or of the firm of *James S. Lane and Smith*, or of any person, constituting one of that firm." Which objection was overruled by the court, and the deed of release held sufficient to be given in evidence to the jury.

As a general position it is incontrovertibly true, that one partner cannot bind another by deed; but this well settled principle of law, was not applicable to the case then before the court. It was not the effect, or operation of the instrument of writing, to charge the partnership with a debt; but

it was nothing more than a release, or discharge of a debtor to the partnership. See 3 *Johns. Rep.* 70, where chief justice *Kent*, in delivering the opinion of the court, holds the following language; “it is a general principle of law, that where two have a joint personal interest, the release of one bars the other, and I cannot perceive that the case of co-partners in trade forms an exception to the general rule. Each partner is competent to sell the effects, or to compound, or discharge the partnership demands. He is to be considered as an authorised agent of the firm, for all such purposes. Each has an entire control over the personal estate.” See also 2d *Wheat. Selw.* 311, where it is said, “there is an exception to the general rule, that a partner cannot bind his co-partners by deed. A release under seal by one partner in the name of the firm, of a debt due the partnership, is binding on all the partners.” The court below were therefore unquestionably correct in the opinion given by them, to which the first exception was taken. Nor do we think, that they erred in the opinion delivered by them, which is contained in the second exception. The plaintiff offered to prove by one of the creditors of the defendants, that he had executed the release before it was signed by *John Smith*, and that *Stone*, one of the defendants, had represented to him, that the creditors generally, had consented to sign the said release, and that the witness had executed it under that impression; and further offered to prove by said witness and another witness, that one of the creditors had refused to execute the release, and the defendants, in order to induce him to sign it, had secretly agreed to pay him, and actually did pay the said creditor, without the knowledge of the other creditors, seventy-five *per centum* of his whole claim, which the plaintiff contended was a fraud upon the other creditors, and rendered the release void, and inoperative as to him. Which testimony the court refused to be given to the jury.

It is presumed that the ground upon which the counsel supposed the release to be invalidated, was, that a deceit had been practised upon the other creditors, by the payment of this extra sum to the refusing creditor. But we do not think such a position tenable under the circumstances of this particular case. There was no understanding that all the creditors were to sign the deed of release upon certain conditions, and to receive nothing beyond their proportions of the trust fund, or that the deed should be void. If such had been the stipulation of the contracting parties, any underhand agreement to pay more, would have been a breach of faith, and a palpable violation of the principles of morality, and fair dealing. *Small vs. Brashley*, 2 Vern. 602. In such a case, a creditor would have a right to say, that he had been imposed upon; that the release had been obtained *per fraudem*, and was therefore void. But in the case now before this court, there is no one feature of fraud, or deception. There was no understanding between the parties, that all the creditors were to receive only a certain sum, by way of composition, for their respective demands; or that their respective releases should be void. On the contrary, the agreement was absolute and unconditional, that the defendants should be discharged, upon the creditors, who should sign the deed of release, receiving their respective proportions of the trust fund; indeed, the evidence offered only tended to prove, that the defendants had represented to the witness, that the creditors *generally* had consented to sign the release, and that he had executed it under that impression. We therefore think, that no deception was practised upon the plaintiff in this case, and that the judgment of the court below ought to be affirmed.

JUDGMENT AFFIRMED.

Magruder, *et al.* vs. Peter, *et al.*—1832.

GEORGE MAGRUDER, *et al.* vs. SARAH PETER, *et al.* LESSEE.—June, 1832.

A testator who was seized in fee, devised as follows : 1st. "The proceeds of all my real estate shall be vested in my wife, for the maintenance and education of my children. 2d. All my debts to be paid as speedily as possible, for which purpose, I desire that the tract of land on which D lives, together with all my personal property thereon, may be sold, and applied to that purpose." 4th. "I desire in the general distribution of the residue of my estate, in the division between my sons and daughters, my sons may receive, in the proportion of five to three. The widow renounced the will. The executors sold the tract mentioned in the 2d clause, and received a part of the purchase money. The purchaser subsequently petitioned for relief under the insolvent laws, and the balance of the purchase money being unpaid, the widow and children, brought an ejectment for this land, each counting upon an undivided interest. HELD, that the legal estate in the lands mentioned in the 2d clause of the will, vested in the children of the testator, as his heirs at law, liable to be divested, upon a legal sale of it under the will, and a compliance with the terms of sale, and payment of the purchase money.

The intention of a testator is to be collected from the will itself; and it is perfectly clear, that the testator in this case did not intend his children should take the land, on which D lived, as devisees.

A devise of the profits of land does not *ex vi termini* pass the land, but only affords evidence, that it was the intention of the testator it should pass. Where a different intention is manifest upon the face of the will, that evidence is rebutted.

Where lands are devised to be sold for the payment of debts, and no person is appointed to execute the trust, the practice is to apply to the Chancellor under the act of 1785, *ch.* 72, to appoint a trustee for the purpose of making the sale, and conveying the estate.

In ejectment, separate demises from several lessors may be laid in the declaration; and the plaintiff at the trial may give in evidence, the separate titles of the several lessors to separate parts of the premises in question, and recover accordingly.

A plaintiff in ejectment may recover less than he declares for, but cannot recover more; and he may declare for less than he is entitled to, and recover it, but it must consist of the same nature with that claimed.

Guardians who have the lands of infants intrusted to them, may make leases to try titles; but the privilege is not extended to those guardians, to whom belong the custody of the infants alone.

When a plaintiff in ejectment relies on a lease made by a guardian, it is necessary to prove at the trial, the legal appointment of the guardian, and that the ward was under age when the lease was made.

APPEAL from *Montgomery* County Court.

Ejectment for sundry tracts of land in *Montgomery* County, on the separate demises of *Sarah Peter*, of one undivided third part; *James B. Beverly*, and *Jane* his wife, of one undivided seventh part; *Elizabeth Peter*, by *Sarah Peter*, her mother, guardian, and next friend, of one undivided seventh part; *William C. Peter*, by *Sarah Peter* his mother, guardian, and next friend, of five undivided equal twenty-one parts; the whole in twenty-one equal parts, to be divided, and on similar demises by *George H.* and *James Peter*.

The defendant pleaded not guilty, and issue was joined.

1. In the trial of this cause, the plaintiff proved that *David Peter* died seized in fee of the several tracts of land declared for, leaving a widow, the first named lessor of the plaintiff, and the other lessors of the plaintiff, who are his children. And then produced in evidence, the last will and testament of the said *David Peter*, dated 30th November, 1812, duly executed and recorded, in which among other devises, are the following, viz. 1st. "It is my intention, that the proceeds of all my estate shall be vested in my dear wife, *Sarah Peter*, for the maintenance and education of my children. 2d. I wish all my debts to be as speedily paid as possible, for which purpose I desire that the tract of land on which *Dolon* lives, together with all the personal property thereon, may be sold and applied to that purpose," &c. 4th. "I desire that in the general distribution of the residue of my estate, in the division between my sons and daughters, my sons may receive in the proportion of five as to three. I constitute and appoint my dear wife *Sarah Peter*, *Captain George Peter*, and *Leonard H. Johns*, my executrix and executors of this my last will and testament." *Sarah Peter*, the widow, renounced and quit claim to the bequests and devises contained in the will, and in lieu thereof elected to take her dower or one-third part of the real and personal estate of the deceased. The defendants thereupon offered in evidence, that the several tracts of land mentioned in the de-

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claration, are the lands which, by the second clause of the will, are directed to be sold. They further proved, that the executors named in the will, made sale thereof on the 7th of June, 1813, and on the 14th of August, 1813, executed a bond of conveyance therefor, to *George Magruder*, in the penal sum of \$41,375 80, stating, that the said lands had been sold by the executors at public auction, on the 7th of June, 1813, and *George Magruder*, being the highest bidder, the same was struck off to him at \$10 12½ per acre, amounting in the whole to \$20,687 90, the terms of sale being, one-third of the purchase to be paid on the 1st of January, 1814, one-third on the 1st on January, 1815, and the remaining third on the 1st of January, 1816, the two last payments to bear interest from the 1st of January, 1814, the purchaser giving negotiable notes, with approved endorsers, and to receive possession on the 1st of January, 1814. That the said *Magruder* had given negotiable notes, &c. The condition was, that the executors would put the said *Magruder* into peaceable possession of the premises, on the 1st of January, 1814, on the full and complete payment of the first abovementioned instalment; and should, before the payment of the whole, cause the lands to be surveyed, and deduct for deficiency, &c. The plaintiff thereupon proved that the defendant, *George Magruder*, entered on the lands under the said sale and agreement, having made the first payment mentioned in the bond, since when he hath made no further payments, (except a part of the interest,) and the balance of the purchase money remains due; and that the said defendant hath duly obtained the benefit of the insolvent laws, and hath transferred all his property to *George B. Magruder*, his trustee. Whereupon the defendants prayed the court to instruct the jury, that upon this evidence the plaintiff was not entitled to recover. But the court, (RIDGELY and KILGOUR, *A. J.*) refused to give said direction. The defendants excepted.

2. In addition to the facts stated in the first bill of exceptions, the defendants further proved, that letters testamen-

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tary on the will of the said *David Peter*, were by the Orphans Court of *Montgomery* county, regularly granted to the persons named as executors in the will of the said *Peter*. They also proved, that the said executrix and executors proceeded to sell the lands named in the declaration, and in the directions of the testator; that the same was sold, and possession thereof delivered to the defendant *George Magruder*, who has ever since been in the possession thereof by himself, his agents or tenants. Whereupon the defendants, prayed the court to instruct the jury, that by the will of *David Peter*, the legal title of the lands of which he died seized, was, by the first clause of the said will, vested in *Sarah Peter*, for the maintenance and education of the testator's children, and said legal title was not in his children, and it is not competent for the plaintiff to recover a verdict for the same upon the demises alleged to have been made by the children; and also, that upon the fourth demise in the plaintiff's declaration, he is not entitled to recover five undivided twenty-one parts, the whole in twenty-one equal parts to be divided, of the premises in the declaration mentioned. Which instruction the court refused to give. The defendants excepted.

The verdict and judgment being for the plaintiff, on the demises by *Beverly* and wife, *Elizabeth*, *William C*, *George H*, and *James Peter*, the defendants prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, and ARCHER, J.

B. S. Forrest, and *A. C. Magruder*, for the appellants.

1. The plaintiff is not entitled to recover upon the demises of the mother, as guardian, and next friend of the children. 3 *Bac. Abr.* 414. *Zouch vs. Parsons*, 3 *Burr.* 1804, 1805, 1806. 2. The devise of the proceeds of all the testator's estate to his wife, for the maintenance and education of his children, vested in her a title to the lands. *Co. Litt.* 4. b. *Parker vs. Plummer*, *Cro. Eliz.* 190.

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3. The land in controversy being directed to be sold for the payment of debts, did not pass under the 4th clause in the will, which directs in what proportion, each child shall take in the general distribution of the residue of testator's estate, but that they are entitled thereto, in equal proportions, and of course, the court erred in refusing to give the last instruction which was prayed.

F. S. Key, for the appellees.

1. The first clause in the will vested no legal title in the widow. 2. The lands directed to be sold, are excepted from the operation of the first clause of the will—no title vested in the heirs at law. 3. The 4th clause, about his sons and daughters, entitle them to take in the proportions specified, and applies to the land directed to be sold, as well as to the rest of the estate. If the sale produced more than the debts, the children would have been entitled to distribution of the surplus according to those proportions. If any of the land was left, after enough sold to pay the debts, it would have been held by the children in the proportions stated in the will. 4. The leases by the infants are good—such leases being *voidable* only, as appears by the case in *Zouch vs. Parsons*, 3 Burr. 1805, and 3 Bac. Abr. 598–9. The leases being stated to be made by the infants, by their mother, and guardian, would be sufficient, and she must be considered as the *actual guardian*, and not merely guardian by nature.

MARTIN, J., delivered the opinion of the court.

This action was instituted by the widow and children of *David Peter*, to recover the possession of the land mentioned in the declaration. (Here the Judge referred to the facts contained in the first bill of exceptions, *ante* 324–5.)

The declaration contains six counts—the first on the separate demise of *Sarah Peter*, the widow, for one undivided third part. The second, on the demise of *James B. Beverly*, and *Jane*, his wife, (who was a daughter of *David Peter*,) for one undivided seventh part, of the lands in the declara-

tion mentioned: the third by *Elizabeth Peter*, (another daughter of *David Peter*,) by *Sarah Peter*, her mother, guardian and next friend, for one undivided seventh part: the fourth, fifth and sixth, on the separate demises of *William C. Peter*, *George Hamilton Peter*, and *James Peter*, (the sons of *David Peter*,) by their mother, guardian and next friend, each for five undivided equal twenty-one parts, the whole into twenty-one equal parts to be divided.

The jury found for the defendant on the first count, and a general verdict for the plaintiff on all the other counts.

The first question that arises upon this statement, is the true construction of the will of *David Peter*, and the intention of the testator is to be collected from the will itself. By that instrument it appears the testator was in debt, and was desirous his debts should be speedily discharged, and in the second clause of the will he directs, "the land on which *Dolon* lives, and all the personal property thereon, should be sold, and the proceeds applied to that purpose." Having disposed of the land on which *Dolon* lived, he directs, "that in the general distribution of the *residue* of my estate, in the division between my sons and daughters, my sons may receive in the proportion of five as to three." It is perfectly clear, that the testator did not intend his children should take the land on which *Dolon* lived, as devisees under his will, because he devised that land for a specific purpose, and gives to his children, only the *residue* of his estate, that shall remain after this land shall be taken out of it—no other interpretation can be given to the word *residue*, and there is nothing else in the will to which it can be applied.

It has been contended, the legal estate in this land vested in *Sarah Peter*, under the first clause in the will, by which the testator declares, "it is my intention, that the proceeds of all my estate, shall be vested in my dear wife *Sarah Peter*, for the maintenance and education of my children;" and it has been said, that a devise of all the profits, or proceeds of land, is a devise of the land itself; because, where a

testator gives all the beneficial interests resulting from the land, it shall be presumed he meant to give the land. If this position is in general correct, it cannot govern this case. A devise of the profits of the land, does not *ex vi termini*, pass the land, but only affords evidence that it was the intention of the testator that it should pass. It cannot therefore apply, where a different intention is manifest on the face of the will. The intention of the testator in this case is not equivocal. It is clear and apparent, that the land mentioned in the second clause of the will, should be sold for the payment of his debts—that all the rest of his estate should be divided among his children, and the mother should be a trustee, to receive the proceeds to maintain and educate them—he never intended to vest the legal estate in the lands *directed to be sold*, either in his children or their mother.

It is to be observed, the second clause in the will directs the land to be sold, to pay the testator's debts, but no person is appointed to execute that trust, and if one had been named, the will gives him a mere *naked power* to sell.

When and where the legal estate shall rest, when lands are devised to be sold for the payment of debts, seems to be a question not yet finally settled. The law books appear to be at variance upon the subject. By some, a distinction is recognized, between a devise of lands to be sold by executors, and a devise that executors shall sell land, &c.; others say, no such distinction exists. *Vide 2 Thomas' Co. Litt.* 138, *notes 1 and m.* 3. *Co. Litt.* 25, (b.) *Sugden on Powers*, 102, 106, 108. *Toller on Executors*, 413, 414.

It is not necessary for us, in the decision of the case before us, to adopt either the one, or the other of those doctrines. It is said in *Sugden on Powers*, 167, "where a testator directs his estate to be sold, without declaring by whom the sale shall be made, if the fund be distributable by the executor, either for the payment of debts or legacies, he will take a power of sale, by implication. *Sug. on Pow.* 173, *note 1.* In *Maryland*, a different course has been gene-

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rally pursued, founded perhaps on an act of the Assembly, passed in 1785, *ch.* 72, by the fourth section of which it is enacted, "if any person hath died or shall die, leaving real or personal estate, to be sold for the payment of debts, or other purposes, and shall not by will, or other instrument in writing, appoint a person or persons to sell or convey the said property, &c.—upon every such case, the chancellor shall have full power and authority, upon application on petition, from any person or persons interested in the sale of such property, to appoint such trustee or trustees, for the purpose of selling and conveying such property, and applying the money arising from the sale, to the purposes intended, as the chancellor shall in his discretion think proper."

The legal estate in the lands mentioned in the second clause of the will, vested in the children of *David Peter*, as his heirs at law, liable to be divested upon a legal sale of that land under the 2d clause of the will, a compliance with the terms of sale, and payment of the purchase money.

David Peter left five children, and each was entitled to one undivided fifth part of the land in controversy. The question is then presented, if the plaintiff was entitled to recover in this action?

The prayer in the first bill of exceptions being general, that the plaintiff was not entitled to recover, the court were correct in refusing to give the instruction to the jury, if he could recover on any one *count* in the declaration.

The second count is on the separate demise of *Beverly* and wife, for an undivided seventh part of all the land mentioned in the declaration. He was entitled, (in right of his wife,) to an undivided fifth part of the whole land—he therefore claims less than he was entitled to receive.

In ejectment, separate demises, from several lessors, may be laid in the declaration, and the plaintiff at the trial, may give in evidence the separate titles of the several lessors to separate parts of the premises in question, and recover ac-

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cordingly. *Jackson vs. Lidey*, 12 *John. Rep.* 185. *Jackson vs. Sample*, 1 *John. Cases*, 231. *Adams on Ejectment*, 187. 6 *Com. Dig. (Am. Ed.)* 419.

A plaintiff in ejectment may recover *less* than he declares for, but cannot recover more: and he may declare for *less* than he is entitled to, and recover it; but it must consist of the same nature with that claimed. *Denn vs. Purvis*, 1 *Burr.* 326. 2 *Phil. Evid.* 170, 171. 2 *Stark. Evid.* 539. 2 *Hayw.* 150, 222. *Carroll vs. Norwood*, 5 *Harr. and John.* 174. *Benson vs. Musseter*, 7 *Harr. and John.* 208.

We think the plaintiff was entitled to recover, on the second count, and the court were correct in refusing the instruction to the jury, as prayed for by the defendant, in the first bill of exceptions.

The second bill of exceptions contains two prayers on the part of the defendant; first, that the plaintiff was not entitled to recover, because the legal estate was vested in *Sarah Peter*; and second, because he ought not to recover on the *fourth* count; those prayers the court also refused.

We have already expressed our opinion on the first prayer, as stated in this exception—that the legal estate did not vest in *Sarah Peter*, but in the children of *David Peter*, as his heirs at law, and thus far we concur with the court below, but we cannot agree with the court, that the plaintiff was entitled to recover on the fourth count.

In the argument of the cause, two objections are relied on by the counsel for the appellant, to this last opinion of the court. *First*, that the plaintiff has recovered *more* in this count, than *William C. Peter*, under whom he claims, was entitled to receive. *Second*, that the mother, *as guardian and next friend*, could not make a lease to try the title to this land.

The first of these objections is certainly fatal. From the authorities before referred to, the law will be found to be clearly settled, that although a plaintiff may declare for *less* than he can legally claim, he cannot declare for, and recover *more* than he is entitled to. *William C. Peter*, one of

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the five heirs at law of his father, was entitled to one undivided fifth part of the lands in controversy—his lessee, or the lessee of his guardian, has been permitted to recover five undivided equal twenty-one parts, the whole in twenty-one equal parts to be divided, which is equal to one-fourth, and a small fraction of the whole lands claimed—this is error, for which the judgment must be reversed.

It is not necessary to enter into a full examination of the second objection, relied on by the counsel for the appellant, that the plaintiff could not recover, on the lease made by the mother, guardian and next friend of *William C. Peter*.

The law seems to be fully established that guardians who have the lands of infants intrusted them, may make leases to try title, but this privilege is not extended to those guardians to whom belong the custody of the infants alone. In all cases where a plaintiff in ejectment relies on a lease made by a guardian, it is necessary for him to prove at the trial, the legal appointment of the guardian, and that the ward was under age when the lease was made. *Adams on Eject.* 68. 2 *Phil. Evid.* 101, 102. 2 *Stark. Evid.* 521. 2 *Selw.* 516. It does not appear from this record, that any evidence was offered to prove these facts.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

GEORGE KRAFT vs. LEWIS WICKEY.—June, 1832.

The Orphans Court of the county where letters of administration are granted, have power under the act of 1798, *ch.* 101, *sub-ch.* 12, to appoint a guardian to the infant children of an intestate, in all cases.

The legality and regularity of such an appointment, can in no manner be affected by the fact, that a guardian for such children had been appointed by the tribunals of another State.

Guardians like executors and administrators, can only sue in the courts of the country from which they derived their power. They have no extra-territorial authority, *qua* guardian.

The domestic guardian, having the property, is bound to pay for the maintenance and education of the ward. And the foreign guardian, having the custody of the ward, can enforce the fulfilment of this requisition by

an application to the proper tribunal. In such a case the domestic guardian would be regarded as a trustee. This results from the extent of the power granted to our courts, to appoint guardians, viz: in all cases where they grant administration, they may protect the rights of infants interested therein.

APPEAL from the Orphans Court of *Baltimore* county.

A petition was filed by the appellee, on the 5th of October, 1829, praying the Orphans Court of *Baltimore* county to revoke the appellant's appointment, as guardian to the infant children of one *Michael Marck*, deceased.

After the appellant had answered the petition, the following statement of facts was agreed on.

"It is admitted in this case, that *Michael Marck* made his last will and testament on the 13th July, 1820, which was duly proved, and recorded in the Orphans Court of *Baltimore* county, and that he died in the city of *Baltimore*, previously to the 16th of August, 1820, leaving a personal estate, consisting of money and leasehold property, situate in said city. That *Michael Kraft*, one of the executors in the will named, took out letters testamentary on said estate on the 19th August, 1820; the other executor named, having renounced the executorship, and that said *Michael Kraft*, settled his first, and final administration account, on the 5th of September, 1821, in which he obtained a credit for the personal estate, as delivered to *Philippina Marck*, the widow of the testator. That at the time of said *Marck's* death, his five children named in his will were living, to wit, *Dorothea*, *Henry*, *Michael*, *John*, and *George*, in the city of *Baltimore*, with their said mother *Philippina*. That said *Philippina* with her said children, about the year 1822, removed to the State of *Pennsylvania*, where she continued to reside up to the time of her death, which happened in June, 1829. That *Dorothea*, one of the children, died under the age of 14 years, before her said mother, in the State of *Pennsylvania*, and that the other children, namely, *Henry*, *Michael*, *John*, and *George*, have ever since the said removal of their mother, resided in the State of *Pennsylvania*, and yet reside there, and are all under

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the age of twenty-one years. And also that the said *Philippina*, before her removal to the State of *Pennsylvania*, intermarried with the petitioner, *Lewis Wickey*, who resided with her in the said State, and has ever since continued to reside there. And that the said *Wickey* was appointed guardian of *Henry, Michael, John, and George*, children as aforesaid, by the Orphans Court for the county of *York*, in the State of *Pennsylvania*: and that on the 17th of August, 1829, the respondent *George Kraft*, applied to the Orphans Court of *Baltimore* county, and was appointed guardian of said children, by the said court of *Baltimore*, who were uninformed of the previous appointment, and duly entered into bond with surety approved of by the court, for the performance of his duty, as guardian aforesaid."

It appeared, by the certificate of the clerk of the Orphans Court in *Pennsylvania*, that the appellee was not required to give security for the performance of the trust confided to him by that court.

The Orphans Court decreed, that the guardianship of the person, and estate, of the said *Henry, Michael, John, and George Marck*, granted by this court to the said *George Kraft*, on the 17th of August, 1829, be, and the same is hereby revoked, inasmuch as the said *Henry, Michael, John, and George Marck*, had a guardian living at that time, who was regularly appointed in *York* county, State of *Pennsylvania*, where both the guardian, and the said minors resided, at the time of such appointment.

From this decree the appellant appealed to this court.

The cause was submitted on notes to *EARLE, MARTIN, STEPHEN, ARCHER, and DORSET, J.*

Mayer, for the appellant.

The question in this cause is, whether a guardian appointed in another State, is authorised by virtue exclusively of such appointment, to act as guardian in this State in respect of property lying here, and under control of our Orphans Courts? The wards in this case lived, at the time of the

guardian's appointment in *Pennsylvania*, the State where he was appointed, and continued to live there when the present cause was instituted in the Orphans Court of *Baltimore* county. Our testamentary system, 1798, *ch.* 101, *sub-ch.* 12, uses terms so general, as necessarily to comprehend the case of wards abroad within the exclusive cognizance and appointing power, as to guardianship, of the Orphans Court, as concerns all property, the *administration of which* has been taken by such Orphans Court. The property in question in this cause, was administered upon under letters from the Orphans Court of *Baltimore* county. It is true, that the clause of the testamentary system referred to, uses permissive terms: "*shall have power to appoint*" guardians; but that phrase is equivalent to "*may appoint*"—and this latter has been construed as *imperative* language when used in any statute. Bond and security under our original testamentary system as to guardians, was not required, as of course to be given (see *sub-ch.* 12, *sec.* 3,) by any guardian appointed by will, or any natural guardians, such guardians are however, now required by subsequent act to give bond before they can act; and that was *always* the case with guardians appointed by the court. (4 *sec.*) In the case before the court, the guardian *had not even given bond in Pennsylvania*, as the record shows.

Although the law of the domicil of a decedent is allowed to regulate the distribution of his personal estate, as concerns the question, who are the persons to be the distributees; yet that *estate* is under the protection and cognizance of the forum of the *lex rei sitæ*, and subject to the local regulations as regards the administration and care of it in reference to creditors, and to *all ultimately* entitled to it. The jurisdiction of the local tribunals *once having attached* by administration, as in this case, cannot, for the purposes of protection be considered as terminated, until the property be finally delivered to some *sui juris* proprietor. The subjection of all personal, as well as real estate, to the care of the local legislation and local tribunals,

is the foundation of the asserted control over it for creditors, and for all others concerned who are not of *themselves* enabled to take and dispose of it. This power of the local jurisdiction seems to be sanctioned by the decision in *5 Peters' S. C. Rep.* 518.

The exclusiveness of the *local jurisdiction* is the ground of our principle, that a foreign administrator has no rights over personality in our State; and chancellor *Kent* has considered the case of a foreign guardian, as standing on the same reason—for he has decided 1 (*John. Ch. R.* 153.) that a guardian appointed in another State, has no power whatsoever in the State where the property lies, or the claim of his ward is to be asserted. In that decision our view is clearly and absolutely sustained; and we rely on it and the cases which are cited there, to show that the Orphans Court here erred. These cases and the general views we have taken, we think, would demonstrate the incorrectness of the court's opinion below; but our act of Assembly referred to, seems to fix the law in our favor, in terms too strict and unequivocal to allow any doubt.

The very existing necessity of applying to the court for the payment of the money to another, instead of the infant, namely, the foreign guardian, while it shows the necessity of a *judicial act* in the matter, also shows the continuing jurisdiction of the court, and its possession of the fund:—and by what rule is the court to govern itself in judging its *power to part with the fund*, unless it be that which the testamentary act lays down, that act being the exclusive charter of the court's powers? The case then in effect resolves itself into a question of Orphans Court *jurisdiction*; as it must be allowed that the question of power to part with the fund, subjected to jurisdiction, is as much a point of jurisdiction as the power to take possession of a fund. There is a reason, too, why the control of the Orphans Court, *as regulated by our local law*, should be prolonged over a fund, where no *positive statute intervenes*, even after the administration *for the benefit of the creditors*, has os-

tensibly been closed. It is, that notwithstanding the close of an administration, and although the residuum has been paid over to the distributee's guardian, a creditor may nevertheless affect that residuum in equity, and oblige the holder to refund, where the creditor happens to have omitted to present his claim within the legal term to the administrator. Where there is an *adult distributee*, the *statute*, positively, and *in terms*, requires the payment over—and there consequently, is an *express* termination put to the court's interference with the fund. Here, however, in case of minors, the right of the court to part with this fund, in this mode, to a foreign guardian, is attempted to be conferred on it merely by *construction*. Constructive powers are explicitly prohibited to be assumed by the Orphans Courts. (1798, *ch.* 101, *sub-ch.* 15, *sec.* 20.) But I do not merely rely on the constructive character of the authority now sought to be allowed to the Orphans Court—but my present view is further to show, that even looking at our law concerning creditors as regards a personal estate, and the policy of our jurisprudence on that subject. The personal property is not *necessarily* supposed to pass from the local jurisdiction and *local legislation*, so soon as the administrator closes his account with the Orphans Court; and that, in fact, some *local legislation* must be shown to take away the fund from our local courts at that particular period. We show that in the case of adults; and our *statute* provides for the case of minors, and the property can leave the control of the Orphans Court only in this way, and subject to the conditions which our statute law may prescribe; our Orphans Court being the limited creatures of statute. Our statute must therefore be referred to, to learn, who are the guardians to be recognized by the Orphans Court. They are only such as the Orphans Court appoints.

Frick, for the appellee.

In this case it is contended for the appellee, that the Orphans Court of *Baltimore* county acted correctly in revoking the appointment of appellant, as guardian for the rea-

sons stated in their decree; and *that* decree is consistent with the meaning and policy of our testamentary system.

It is denied by the appellee, that the terms of the act of 1798, *ch. 101, sub-ch. 12*, are in words so general, as *necessarily* to comprehend the case of wards abroad—for, in the 2d *sec. of the sub-ch.* power is given “to call or have brought before them, any orphans, *as aforesaid*, for the purpose of appointing a guardian;” and this section certainly cannot contemplate to carry this power into another State.

The whole of this sub-chapter hath reference to the custody of the infant’s *person*, with reference to his maintenance and education out of his property; and is part of that curative system which every State, as *parens patriæ*, exercises over its minors and orphans. That duty in this case is incumbent on the State of *Pennsylvania*, not upon us. On the application of the infants and widow, the appellee has been rightfully constituted guardian of their *persons and estates*, by and in *Pennsylvania*, where, it is not an overstrained presumption to suppose, their interests and the bulk of their property are concentrated.

But, conceding that there is property in this State, (although it appears by the record, that the whole of the testator’s estate was delivered to the widow, and that she removed to, and died in another State;) and that the court ought to have sustained the claims of the appellant; conceding this, would not his appointment here confer upon him the custody of the infant wards, requiring him to bring them into this State, and thus invite a conflict of jurisdiction with the tribunals of another State, who have delegated that parental authority to the appellee? What is the possession of the property unaccompanied with the *custody of the ward*? Can such a thing have been in the contemplation of the framers of our testamentary acts? Much less the idea of two conflicting claimants contesting, under the authority of independent courts, the right to the possession of the ward. Who, of the two guardians, is responsible for the

leading intent of the law, the maintainance and education of the ward? *Is it not agnum committere lupis?*

It cannot therefore be, that the act of Assembly referred to, ever contemplated to separate the possession of the infant's property from the custody of the infant—and the reasoning, from the rule laid down in the case cited by appellant, (1 *Johns. Chancery*, 156) “that letters testamentary give no authority abroad,” does not apply; because administration has particular reference to the collection and custody of the *property alone*; and is unlike, in this respect, to guardianship, that takes up that property, *together with, and inseparable from the custody of the infant*, when the functions of the administrator have ceased.

2dly. Are the Orphan's Court bound to appoint? Are the words of the act imperative to appoint upon any application, whether a case is, or is not, made out to justify the interference of the court? Such a case as brings the infant within the limits and under the protection of the State, which is one essential; and having property within the State, which is the other essential? Even in such a case, an infant hath the right reserved at a certain age to name a guardian, (*see* 1715, *ch.* 39, *sec.* 7,) while it appears that the appointment of the appellant, in this case, was without the concurrence or knowledge of the infants, *being of sufficient age*, and under a mistaken assumption of the court, that the infants resided in this State, and had no legally constituted guardian. The power is certainly so far discretionary, that they are to judge of the case presented to them; and having acted without all the facts of this case before them, they had a right, and they did right, on a full presentation of the case, to revoke the appointment in question. “The Orphans Courts are tribunals confessedly limited in their jurisdiction, unable to exercise any authority whatsoever, not expressly given by law;” and it is a question whether the testamentary laws of this State give to them, or can give to them authority to appoint guardians for the custody of infants, who are not within the limits or the juris-

diction of the State, and who cannot be made subject to the control of such guardian, or the powers of the court as contemplated by the second section of sub-chapter 12, of the act of 1799;—and, even if given, it must be viewed as a discretionary power, which they have exercised with sound judgment in its application to this particular case.

ARCHER, J., delivered the opinion of the court.

Administration on the estate of *Michael Marck* having been granted in *Baltimore* county, the Orphans Court of that county had express power conferred upon it to appoint a guardian to his infant children, and the legality, and consequent regularity of this appointment could, in no manner, be affected by the fact, that a guardian for these children had been appointed by the Orphans Court of *York* county, in the State of *Pennsylvania*. For the appointment of a guardian granted in a foreign State can have no extra-territorial operation, so as to oust our courts of their jurisdiction over the property of infants.

This appears long to have been the doctrine in *England*, with regard to executors and administrators, who, deriving their powers from foreign tribunals, had not only no power to supersede those appointed to the administration of the estate by the domestic forum, but had not even the power to sue for and recover rights and credits of their testator or intestate.

Chancellor Kent, in 1 *Johns. Ch. Rep.* 156, refused to decree payment of a legacy to a guardian appointed by the courts of *Pennsylvania*, and declared the necessity of an appointment of a guardian in *New York*, before the legacy could be paid, and expressed his opinion, that the same rule should govern the case of guardians, as was applicable to executors and administrators.

It is said in *Tourtort vs. Thower*, 3 *P. Wms.* 369, that our courts take no notice of what is done in the Spiritual Courts beyond sea. If it be true, that foreign guardians could not,

qua such, sue in our courts, (and that persons coming in *en autre droit*, under the appointment of foreign laws, cannot sue, would seem to be settled. 4 Cowen 529, *note*.) to consider, under such circumstances, the foreign guardian the only person who could rightfully administer his ward's property, would be to render such foreign guardian utterly powerless to perform his trusts. For, although the only legal guardian, he could recover nothing.

It seems to us, that the legislature has placed all the personal property of the wards within the limits of the jurisdiction of the Orphans Court granting letters, under the peculiar protection of our laws. It is to be managed and governed by them, and protected by all those rules which have been so carefully prescribed for its preservation. To give a sanction to the foreign appointment of a guardian, in its consequences, would subject it to different rules and regulations never anticipated by the legislature.

Thus our law imperatively requires, that every guardian appointed by the court should give bond with security; whereas, should the guardian in *Pennsylvania* be entitled, he has given no security.

But it is supposed, that the determination which would give validity to the guardian's appointment, made by our courts, when, at the same time there existed a guardian appointed by a foreign power, would produce a conflict of jurisdictions prejudicial to the interests of the minor. But it cannot be perceived in what manner this result is to be produced. The control of the person of the ward being with the foreign jurisdiction, cannot be disturbed by the guardian here; on the other hand, the foreign guardian cannot interfere with the management and control, by the domestic guardian, of the ward's property. It is true, the domestic guardian is bound to pay for the maintenance and education of the ward, and the foreign guardian can always enforce the fulfilment of this requisition by an application to the proper tribunal. The obligation of the domestic guardian, it is scarcely necessary to say, to pay for the

maintenance and education of the ward, out of the property under his control, is precisely the same whether the ward reside here, or within a foreign jurisdiction. It is true, that in all cases of wards within our jurisdiction, the guardian acts both the part of a *tutor* and *curator*, and as such takes custody of the person and property of his ward. But, as the act of 1798 contemplated a guardianship in all cases where the property was administered upon here, there may be cases in which the guardian would only act as a trustee of the property; applying it, to be sure, for the support of the infant, without however his having the immediate care and custody of his person. And the case before us appears to be one of that description.

DECREE REVERSED.

HENRY G. DAVIS vs. LUKE GRIFFITH.

In an action upon the case for publishing a libel in which plaintiff was charged with being "a degraded scoundrel, liar and blackguard:" the defendant may prove in mitigation of damages, under the general issue plea, that the plaintiff, shortly prior to the publication of the libel complained of, charged the defendant with being guilty of false swearing in a certain cause in which the defendant had been examined as a witness.

APPEAL from *Harford* County Court.

This was an action upon the case for slander. The declaration, with the necessary inuendoes, charged the defendant (the now appellant) with publishing of, and concerning the plaintiff, (now appellee,) a certain false, scandalous, malicious, and defamatory libel, viz. "A card. There having been erroneous charges made against me by *Luke Griffith*, and first called on by me, he promised satisfaction by saying he would meet me at any place. The first appointment having been frustrated, I called on him for a second, and he refused, saying he did not wish to have any communication with me, (which message was delivered by a lady

at the door,) after having discovered I had certificates to prove what he stated to be false. Now, as he has shunned the rules that govern all honorable society, by refusing such satisfaction as one gentleman should give another, I openly and candidly avow him a paltry, infamous, scandalous, and degraded scoundrel, a liar and a blackguard. The above, from the most scrutinizing construction that can be placed on it, is a pledge of my future conduct.”

The defendant pleaded not guilty, upon which issue was joined.

1. At the trial the plaintiff offered in evidence the card set forth in the declaration, dated the 1st of May, 1825, signed by the defendant; and proved that copies of the same were set up at different public places in *Harford* county, one of them by the defendant in person, prior to bringing this action; and there rested his cause.

The defendant then asked a witness produced by him, for the purpose of mitigating the damages in this action, whether or not the plaintiff, shortly prior to the publication of the papers given in evidence by the plaintiff, did charge the defendant with being guilty of false-swearing in a case in *Harford* County Court, in which the defendant had been examined as witness. To which question, for the purpose aforesaid, the plaintiff objected. And the court, [ARCHER, Ch. J., and HANSON, A. J.] being opposed in opinion on such objection, refused to permit the answer of the witness to go to the jury. The defendant excepted.

2. The defendant again, for the purpose of mitigating the damages in this action, proposed and offered to prove, that on the — of March, 1825, the defendant was examined as a witness on behalf of *Elijah Davis*, in a suit by him against the present plaintiff, in which there was a verdict against the present plaintiff; and, to prove that the defendant was so examined, offered the record and proceedings of the said cause; and then also offered to prove, that immediately after the said trial, the plaintiff charged the defendant with false swearing as witness in the aforesaid trial. Which charge

the defendant also offered evidence to prove was untrue. The defendant further offered to prove by *George W. Hall*, a competent witness, that he, the witness, was present at several conversations between the plaintiff and other persons in relation to the testimony of the defendant in the trial aforesaid, in which it was, according to the impressions and belief of the witness, in substance stated by such other persons, and not contradicted by the plaintiff then present, that the publication and libel of the plaintiff by the defendant was caused by the charge aforesaid, made by the plaintiff against the defendant. To all which testimony, and any part of it, so offered on the part of the defendant, the plaintiff objected as inadmissible testimony to reduce the damages claimed in this action. And the court being divided in opinion on the admissibility of the testimony, on the prayer of the plaintiff, refused to let such testimony go to the jury for the purpose aforesaid. The defendant excepted. And the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and EARLE, STEPHEN, and DORSEY, J.

Gill, for the Appellant.

The question is whether the conduct of the plaintiff, provoking the libel, could not be given in evidence in mitigation of damages. It may be admitted that part of the evidence offered in the second exception was not admissible, yet, if any part was admissible, that part ought to have gone to the jury, and the court was wrong in rejecting the whole. A part of the evidence offered was, the plaintiff himself admitted, that he had provoked the libel, and that part was clearly admissible. He referred to 3 *Stark. Ev.* 1460. *Foot vs. Tracey*, 1 *Johns. Rep.* 46, 52. *Bodwell vs. Swan*, 3 *Pick. Rep.* 376. *Paddock vs. Salisbury*, 2 *Cowen*, 811. *Ross vs. Tapham*, 14 *Massa.* 275. *Alderman vs. French*, 1 *Pick. Rep.* 1.

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No counsel argued for the appellee.

The court of appeals reversed the judgment of the county court, upon both exceptions, and sent the record back, with a procedendo.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

HENRY SHAFER vs. GERARD STONEBRAKER.—June, 1832.

It is a grave question, whether by the Act of 1763, *ch.* 23, the legislature did not intend to interdict, altogether, the use of special demurrers; but the practice of sustaining them by every judicial tribunal in the State has engrafted upon that act, an interpretation, which nothing but another act of Assembly can change.

When matter of record is pleaded, the omission to insert, *prout patet per recordum*, is a fatal defect, if assigned as cause of special demurrer; and there is no difference in this respect, between records of the same, and those of any other court.

Where matters of fact as well as of record are averred in a plea, the conclusion should be by a general verification, and not with a verification by the record.

A defendant may plead in bar at the same time, a judgment in a prior action by way of estoppel, and the general issue. These are not inconsistent nor incompatible pleas.

G on the 3d November, 1829, brought an action upon the case against S, for an injury to his mill, by backing water upon it from a mill-dam below. He claimed damages from the 10th September, 1827, to the time of the impetration of his writ. S pleaded in bar a verdict and judgment in his favor, in a prior action brought by G against him, on the 9th November, 1827, for an injury of precisely the same character, committed upon the 1st June, 1822. Among other allegations, the plaintiff averred in both suits, that the defendant had raised and increased the height of his mill-dam or tightened it, whereby the water course was obstructed, &c., and the plea in this action, after setting forth the proceedings in the first cause, prayed judgment if the plaintiff ought to be admitted against the first verdict and judgment, to say that the defendant had so raised his dam, &c. The first action was tried upon the plea of not guilty. Upon demurrer to this plea, it was held, that no matter of fact or of right appearing under the circumstances to have been distinctly put in issue in the first suit, the finding

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of the jury and judgment of the court, formed no estoppel to a recovery in the subsequent action.

The rule by which the sufficiency of a plea of a prior judgment by way of estoppel is to be tested, is, does it plainly appear that the fact or right relied on as a bar, was distinctly put in issue, and found by the jury, in a former suit between the same parties.

The plea of not guilty in an action upon the case, puts in issue not only every material fact contained in the declaration, but every defence admissible in evidence under such a plea, of which the defendant should offer testimony.

Under such a plea the defendant may give in evidence a release—satisfaction—an award—a license to do the act complained of—any justification or excuse, or whatever in equity and conscience, according to the existing circumstances, precludes the plaintiff from recovering.

It is a general rule, that the verdict and judgment upon the merits in a former suit, is, in a subsequent action, between the same parties, where the cause of action, damages, or demand are identically the same, conclusive against the plaintiff's right to recover, whether pleaded in bar, or given in evidence under the general issue, where such evidence is legally admissible; and that such prior verdict and judgment need not be pleaded by way of estoppel.

APPEAL from *Washington County Court*.

This was an *Action on the case*, instituted by the appellee, against the appellant, 3d November, 1829. The declaration averred, that whereas the said *Gerard*, on the 10th September, 1827, and long before, was, and from thence hitherto hath been, and still is, lawfully seized and possessed of a certain close, on which is erected a mill for the sawing of timber, and carding of wool, with the appurtenances situate, &c. and in which said mill and close, he the said *Gerard*, during all the time aforesaid, used, &c. the trade, and employment of sawing timber, and carding wool, to wit, at, &c. and whereas a certain water course from time immemorial until the time of committing the grievances hereinafter next mentioned, did run and flow, and was accustomed to run and flow, and at the time of committing the grievances hereinafter next mentioned, and from thence hitherto, of right ought to have run and flowed, from and below the said mill and close of the said *Gerard*, in its ancient channel, and at the natural and ancient height of

the stream. And whereas until the committing of the grievances hereinafter mentioned, the said mill was unimpeded in its operations by backwater, or any manner of artificial flooding of said stream below the said mill, to the great benefit and advantage of the said *Gerard*. Yet the said *Henry* well knowing the premises, but contriving, &c. wholly to deprive the said *Gerard* of the use, &c. of the said mill, and close, and to hurt, &c. the said *Gerard*, in his possession of said mill, and his seizin of the said close, with the appurtenances; whilst the said *Gerard* was so possessed and seized, to wit, on the said 10th September, 1827, wrongfully increased the height of a certain dam of him the said *Henry*, situate below the mill of the said *Gerard* on the same stream, to wit: in the county aforesaid, and with stone and earth, &c., raised and close stopped the said dam, and unjustly kept and continued the said dam, so raised, &c. for a long time, to wit, from thence hitherto, and thereby during all that time, wrongfully and unjustly raised, obstructed, and stopped the said water from running in its accustomed channel, from, and below the said mill of the said *Gerard*, and thereby wrongfully and injuriously raised the water in the said water course, at the mill of the said *Gerard*, and upon the sheeting, and under the wheel of the same, above the ancient and accustomed height of the stream, and flooded the wheel of the said mill with backwater, to wit, on, &c. at, &c. By means whereof the operation of the said mill was impeded and stopped, and the said *Gerard* lost, and was deprived of the use, &c. of his said mill and close, and the same during all that time hath been of no use, &c. to the said *Gerard*, on account of the backwater under the wheel, occasioned by the premises aforesaid, to wit, at the county aforesaid.

The *second count* charged,—and whereas also the said *Gerard*, on, &c. at, &c. and long before was, and from thence hitherto hath been, and still is, lawfully possessed of a certain mill used for the sawing of timber, with the appurtenances, situate, &c. in which said mill, he the said

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Gerard, during all the time aforesaid, used, &c. the trade, &c. of sawing timber, and carding wool, to wit, at the county aforesaid; and whereas a certain water course from time immemorial, until the time of the committing the grievances hereinafter mentioned, did run and flow, and was accustomed to run and flow, and at the time of committing of the grievances hereinafter next mentioned, ought of right to have run and flowed, from the upper side of a certain close of the said *Gerard*, unto, and from the said mill of the said *Gerard*, uninterruptedly, for the supplying of the said mill with water, and for the driving and working of the said mill; and whereas the said *Henry* had erected a dam across the said stream, below the mill of the said *Gerard*, situate, &c. and until the committing of the grievances hereinafter next mentioned, the said *Henry* had left certain openings in his said dam, through which the water of the said stream flowed freely, and was accustomed from time immemorial to pass freely; by means of which openings the water above the said dam, in the said stream was kept at its usual and ancient height and state, yet the said *Henry* well knowing, &c. but contriving, &c. to hurt and injure, &c. the said *Gerard*, in the possession of his said mill with the appurtenances, to wit: on, &c. at, &c. wrongfully and unjustly shut up, stopped and closed the said openings, in the said dam of him the said *Henry*, by means whereof, the said stream became swollen, and dam backed upon the sheeting of the said *Gerard*, and the water of the said stream through the close, and from, and below the mill of the said *Gerard* became impeded, and dammed above its ancient height and accustomed level; by means whereof, the said *Gerard* could not have the force of the said water for working his said mill, as before the grievance complained of, and the said mill has by reason of the premises been all the time aforesaid, of no use, &c. to the said *Gerard*; and the said *Gerard* has, during all that time lost the benefit, &c. of the same, and is greatly damnified in his possession thereof, and in his trade and business, to wit, at, &c. wherefore the said *Gerard* hath sustained damages, &c.

The defendant pleaded,

1st. "That he, the said *Gerard*, ought not to be permitted to say or allege, that he, the said defendant, increased the height of his said dam, or close stopped and tightened his said dam, whereby he obstructed the water of the said stream, and caused it to rise above its ancient, and accustomed height, and to flow back upon the said wheel, and sheeting of the said plaintiff, at the mill of the said plaintiff, to the damage of the said plaintiff, because he saith, that heretofore, to wit, on the said 9th November, 1827, he the said plaintiff sued out of *Washington* County Court, here, a certain writ of trespass, on the case against him the said defendant, and afterwards at November term of the said court, on the third Monday of November, 1828, he the said plaintiff declared against him the said defendant, here in the said court, that whereas the said plaintiff, on the 1st May, 1822;" (here follows the declaration in the first action, in which the injury to the plaintiff alleged to have been done, 1st June, 1822, is substantially the same as in this,) and the verdict and judgment on the plea of *not guilty* is alleged to have been for the defendant, which said judgment is still in force, and remains of record in this court, &c. the plea then proceeds. "And the said defendant in fact saith, that the plaintiff and defendant named in the record of the said former suit, are the same parties, as in this suit, and that the said mill of the said plaintiff, and the said water course in the declaration in the said former suit mentioned, are the same mill of the said plaintiff, and the same water course mentioned in the said declaration of the said plaintiff in this suit, and that the dam of the said defendant, and the raising and increasing the height thereof, and the tightening thereof, whereby the water of the said water course was obstructed, and caused to rise above its ancient and accustomed height, and to flow back upon the wheel of the said plaintiff, mentioned in the said declaration of the said plaintiff in the said former suit; and the dam of the said defendant, and the raising and increasing

the height thereof, and the tightening thereof, whereby the water of the said water course is obstructed, and is caused to rise above the ancient and accustomed height of the said stream, and to flow back, and to flood the wheel of the said mill of the said plaintiff with backwater, now complained of, and mentioned by the said plaintiff in his said declaration in this suit, are the same, and not other and different, and this the said defendant is ready to verify. Wherefore he prays judgment, if the said plaintiff ought to be admitted against the said verdict and judgment, to say or allege, that he the said *Henry* has raised and increased the height of his said dam, or tightened the same, whereby the water of the said water-course has been obstructed, and caused to rise above the ancient and accustomed height of the said stream, and to flow back, and flood the wheel of the said plaintiff, at his said mill, with back water, to the damage of him the said plaintiff.

2d. *Plea not guilty.*

Issue was taken to the second plea, and a special demurrer filed to the first, for which the following causes were assigned.

1. That there is no *prout patet per recordum* set forth, or contained in the said plea.

2. That said plea does not set forth, that the said defendant is ready to verify the same, by the record of the former action mentioned in the said first plea.

3. That the said first plea is uncertain and insufficient in this, it does not set forth, that the jury in the said first action gave a verdict therein.

4. That the said first plea is uncertain and insufficient in this, that it does not set forth, that the judgment of the court in the said first action was given or rendered upon any verdict, or any finding of the jury therein.

5. That the said first plea is uncertain and repugnant in this, that after alleging that the said defendant had rightfully raised and increased the height of his said dam, it prays the judgment of the court, if the said plaintiff ought to be ad-

mitted to say, that the said defendant had so raised or increased the height of his said dam.

6. Because, in and by the two aforesaid pleas of the defendant, there is an *estoppel* pleaded with a *traverse*, which require different modes of trial by different tribunals.

The County Court sustained the demurrer to the first plea; and the verdict and judgment on the second, being for the plaintiff, the defendant prosecuted the present appeal.

The cause was argued before EARLE, MARTIN, STEPHEN, and DORSEY, J.

Yost, and Anderson, for the appellant, contended,

1. It was not necessary to allege, *prout patet per recordum*, *Skinnors' Rep.* 520. Statute, 4 *Ann*, ch. 16, sec. 2, and more especially is this the case when a record of the same court is pleaded. All that can be required in such a case is, to aver that it remains in full force, because it is there subject to the inspection of the court. 6 *Com. Dig.* 132. *Title Pl. (E.)* 129.

Where the plea is of fact, and of record also, a verification by the record is not necessary or proper. *Clerk vs. Hoskins*, 3 *Mod. Rep.* 79. 2 *Saund. P. and Ev.* 315. 1 *Chitty Pl.* 393. *Lytle vs. Lee and Ruggles*, 5 *Johns. Rep.* 114. *Thomas vs. Ramsey*, 6 *Ib.* 26. *Karthus vs. Owings*, 2 *Gill and Johns.* 443.

In this case there is a mixture of fact and record; the fact being the indenture of the parties, &c. upon which issues might have been raised for the jury. They insisted further, that special demurrers are prohibited in this State, by the act of 1763, ch. 23. *Kilty's Rep.* 245. *Perkins vs. Perkins*, 1 *Harr. and McHen.* 406.

On the 3d and 4th causes of demurrer they referred to 2 *Chitty Pl.* 483. *Outram vs. Morewood*, 3 *East.* 349, 350. 1 *Saund. Rep.* 75, 92, 93, (*note 2.*)

On the 5th, to *Stephen on Pl.* 379, and contended also that the objection is unfounded in fact.

On the 6th cause of demurrer they cited 1 *Chitty Pl.* 394, 395.

2. The plea is good in substance. *Outram vs. Morewood*, 3 *East.* 345. *Strutt vs. Bovingdon*, 5 *Esp. Rep.* 58. 1 *Stark Ev.* 198, 199, (*note.*) 3 *Wil. Rep.* 308. *Shelton vs. Barbour*, 2 *Wash. Rep.* 64, 65. *Preston vs. Harvey, Hen. and Mun.* 63-4. *Vooght vs. Winch*, 2 *Barn. and Ald.* 662. It is not to be regarded as an odious plea, even if *pleaded* as an estoppel, its tendency being to prevent litigation, nor is the greatest degree of certainty required in framing it. 1 *Chitty Pl.* 175. *Dovaston vs. Payne*, 2 *H. Black.* 530. *King vs. Horn*, 2 *Cowp. Rep.* 682.

Price and Dixon, for the appellee.

1. The plea is bad upon general demurrer—a verdict in a former action cannot be final, and conclusive, unless the pleadings in such former action, reduced the controversy to a single point. 1 *Stark Ev.* 200. The issue in the former action was upon the plea of *not guilty*; and there are various defences applicable to such a state of the pleadings, which may have defeated the plaintiff. 1. The jury may have found, that the defendant did not do the act complained of. 2. That he had a right to do it. 3. The plaintiff may have failed in proving an injury, &c.; and it is impossible therefore, to say upon what precise ground the verdict in that case was founded. *Standish vs. Parker*, 2 *Pick. Rep.* 20. 1 *Serg. and Low.* 243. *Parker vs. Standish*, 3 *Pick.* 288. 7 *Pick.* 147. The point was not before the court in the case of *Barn. and Ald.* referred to on the other side, and what is there said, consequently, is *obiter*. But the want of certainty renders this plea defective, even upon general demurrer. *Dovaston and Payne*, 2 *H. Black.* 527. 5 *Bac. Abr.* 428. 1 *Chitty Pl.* 176. *Archb. Pl.* 223-4-5, 238.

2. The plea is defective in form, and bad on special demurrer. The want of the *prout patet per recordum*, and *hoe paratus*, &c. is fatal to it, and it is no answer to say, that these requisites are dispensed with, by the mixture of

record and fact contained in it. This, so far from curing the defect, is itself an objection, as it makes the same plea, present matter to be tried by different tribunals, the court and jury. *Archb. Pl.* 143, 144, 163, 251, 253. 1 *Chitty Pl.* 393, 512, 513. *Stephen on Pl.* 434. 5 *Bac. Abr.* 444, 445.

In support of the 6th cause of demurrer, that an *estoppel* was pleaded with a traverse, they cited, 5 *Bac. Abr.* 428. *Le Conte vs. Pendleton*, 1 *John's cases*, 104. *Archb. Pl.* 253.

They insisted that the long and uninterrupted use of special demurrers, since the act of 1763, had given it a construction, which it was too late now to shake. They had been ever since the passage of that act, received in all the courts without question or hesitation. 2 *Harr. Ent.* 297, 591. *The State vs. Green*, 4 *Harr. and Johns.* 543. 7 *Ib.* 373, 376. *Chandler vs. The State*, 5 *Ib.* 284.

DORSEY, J., delivered the opinion of the court.

The appellants have insisted, that the judgment of the County Court should be reversed, because, since the act of Assembly of 1763, *ch.* 23, all special demurrers, say they, are prohibited in *Maryland*.

If this act of Assembly were now, for the first time, to receive a judicial exposition, it might be a very grave question, whether it were not the intention of the legislature, and whether that intention is not sufficiently expressed, to interdict, altogether, the use of special demurrers. But we do not consider that question as being now open for examination. The practice of sustaining special demurrers, by every judicial tribunal in the State, hath engrafted upon this act of 1763, an interpretation which nothing but an act of Assembly can change.

Are the objections raised to the plea, by way of special demurrer, well founded, is the next inquiry to be considered? That when a matter of record is pleaded, the omission to insert *prout patet per recordum*, is a fatal defect in

the plea, if assigned as cause of special demurrer, is a principle so universally recognized, that it cannot be necessary to offer authorities to prove it.

There is nothing in the present case which dispenses with the necessity of its introduction. Nor is there any thing in the books to warrant the distinction attempted to be drawn in this respect, between records of the same court, and those of any other court. The *prout patet per recordum* is equally necessary in both cases.

The second cause of demurrer we do not think sustainable. The plea contains averments of material matters of fact, as well as of record, on which an issue might have been taken. Of these facts, the record would have been no verification; and such a conclusion would, therefore, have been erroneous. Where matters of fact, as well as of record, are averred in a plea, the conclusion should be by a general verification, and not with a verification by the record. *Karthus vs. Owings*, 2 *Gill and Johns*. 430. 2 *Chitty's Plead.* 454, 493. 1 *Chitty's Plead.* 572. *Archb. C. P.* 227, 249. *Pitt vs. Knight*, 1 *Saund.* 91. 2 *Saund. P. and Ev.* 755. *Thomas vs. Ramsey*, 6 *Johns.* 26. *Little vs. Lee and Ruggles*, 5 *Johns.* 112. We deem the validity of the plea unaffected by the third, fourth, and fifth causes of the demurrer, nor do we think it less unexceptionable, for the reason assigned in the sixth cause, to wit, "that by the two aforesaid pleas of the defendant, there is an estoppel pleaded with a traverse, which require different modes of trial, by different tribunals." If an issue were joined on the record, and also on the plea of not guilty, both issues would be tried in the same forum, though before different branches of it, but both under the same controlling power. What is there objectionable in this? Is it not every day's practice to have issues of law and fact, for trial at the same time, in the same cause? The former are first disposed of by the court, and then the latter are tried by the jury. Can any inconvenience result from such a course of practice? But it has been alleged that these are

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inconsistent, incompatible pleas. In what does that inconsistency or incompatibility consist? It has not been pointed out in the argument, nor can we discover it. Both pleas may well stand together; there is no contradiction between them. If the plea of estoppel be sustained, a *fortiori*, is the plea of not guilty sustainable. If the issue on the former terminate in favor of the plaintiff, that on the latter may still be found for the defendant? The same pleadings were used in *Outram vs. Morewood and wife*, 3 East. 345, and in many other cases, which if were necessary, might be referred to.

The questions of form being disposed of, how stands the plea as to matter of substance? Is it good on general demurrer, is the next subject for our consideration? This being a plea by way of estoppel, the rule by which its sufficiency is to be tested, is a certain and familiar one. Does it plainly appear that the fact or right relied on as a bar, was distinctly put in issue, and found by the jury in a former suit between the same parties. The matter here alleged to have been decided by the jury in the former trial, is that the raising and stopping of the mill-dam of the appellant, and thereby blocking the water upon, and impeding the water wheel of the appellee, was lawful, and gave no right of action to the appellee. Was that the question distinctly submitted to the jury, and established by their finding? If it were, the record presents the most vague and inconclusive evidence of that fact. The plea in the first trial was what? *not guilty*; which put in issue, not only every material fact contained in the declaration, but every defence admissible in evidence under such a plea, of which the defendant should offer testimony. And under the general issue in this form of action, the defendant may give evidence of a release, satisfaction, award, license to raise and stop the dam, and back the water, until the time of issuing the writ in the first action, or any justification or excuse, "or whatever will in equity and conscience, according to the existing circumstances, preclude the plaintiff from recovering." 1 Chit.

Pl. 386. What is it then, that the jury have found in the former suit? Was it, that the appellee was not seized and possessed of the mill, as charged in the declaration? That the appellant did not raise and stop his dam? That such raising and stopping did not back the water, and obstruct or impede the water wheel of the appellee? That the appellee had released the cause of action, or received full satisfaction for the injury committed? That he had licensed the acts of the appellant until the time of the suit? or that the appellant had a right to do, and continue, the acts complained of? Upon the jury's being satisfied of the truth of any one of these grounds, they were bound to have found a verdict for the appellant.

All these questions were open for their consideration, under the pleadings in the cause, and on which of them their verdict was founded, the record furnishes us no guide to discover. No matter of fact or of right, therefore, having been distinctly put in issue on the former trial, the finding of the jury and judgment of the court, form no estoppel to a recovery in the subsequent action.

The case of *Vooght vs. Winch.* 2 *B. & A.* 662, has been referred to as a decisive authority, that the verdict and judgment relied on in the plea before us, are a conclusive bar. And if the *dictum* of the judges in that case, were sound law, it would be difficult to evade the force of their decision.

But that *dictum* is at war with every principle of special pleading, and with all previous adjudications on the subject. It was a point not discussed in that cause, and none of the anterior decisions on the subject were referred to. The question there was, whether a verdict in a former suit, when offered in evidence under the general issue, in a subsequent action, was as conclusive a bar, as if it had been pleaded by way of estoppel. And the judges in their opinions upon that point, which alone was before them, after establishing the distinction between the conclusiveness of a verdict, when specially pleaded, and when offered in evidence on the general issue, without considering the circumstances

and character of the particular verdict in question, rather to illustrate the principle of their decision, than any thing else, proceed to say, "it would have been conclusive if pleaded in bar to the action by way of estoppel."

This decision in *Vooght vs. Winch*, (if indeed a decision it can be called,) is wholly irreconcilable with the case of *Outram vs. Morewood and wife*, 3 *East* 345, the great land mark of the profession in exploring questions of this kind. And also to *Miles vs. Rose, and another*, 5 *Taunt.* 705, reported in 1 *Serg. and Low.* 240; and the much stronger case of *Sir Federick Evelyn vs. Haynes*, cited by Lord *Ellenborough* in *Outram vs. Moorewood and wife*; and to *Standish, petitioner, vs. Parker, et al.* 2 *Pick. Rep.* 20. In the two latter cases, this principle of technicality is certainly stretched to its utmost length, and impairs in a very great degree, the utility of the general rule, as to the conclusiveness of former verdicts. The facts which constitute the plaintiffs' right of action, are charged in their declarations, and are put in issue by the general plea of not guilty. Before the jury in either of those cases could find a verdict for the plaintiff, thus determining the question of right in his favor, they must of necessity have decided that every averment in the declaration, material to the establishment of the plaintiff's right, was true. Can it then be said that the right of the plaintiff, that the facts which constitute such right, have not been distinctly put in issue, and found by the jury? To say so, would be to add a new condition to the rule—that the right must not only be distinctly put in issue, but that a separate issue must be framed upon every fact, essential to the constitution of that right. The reason assigned by Lord *Mansfield* for his decision in *Evelyn vs. Haynes* was, "because no issue was taken in the first action upon any precise point." But can it be material, where several facts are to be tried, all of which are necessary to constitute the right of the plaintiff, whether the whole of those facts are submitted to the determination of the jury on one issue, or a separate issue be joined upon

each individual fact? If the verdict upon the one issue must be against the right, unless they find the truth of every fact submitted to them as its basis, is not their verdict thus given in favor of the right, as distinct a determination of its existence, as if rendered on issues, on each particular fact by which it is constituted? Thus to restrict this wise, and necessary axiom of legal policy, would be almost to destroy its utility. A better reason for *Lord Mansfield's* opinion might perhaps be found in the suggestion, that although the finding of the jury, did assert the right to exist in the plaintiff at the time of its violation, for which indemnity is recovered in the first suit; yet that it does not irresistibly follow, that its existence continued, during the time of the injury complained of in the second. But an averment to that effect in the plea, it is conceived, would obviate that objection.

If the technicalities incident to pleadings by way of estoppel, and the diversity of effect, as regards conclusiveness, when a verdict and judgment in a former suit are relied on as a bar, by way of plea, or as evidence, be applied to cases, where the second suit is not only predicated upon the same right, but upon the same identical cause of action, being for the recovery of the same damages, that necessary and wholesome principle of the common law, "*nemo debet bis vexari, pro eadem causa,*" so highly approved of by the most distinguished jurists of ancient and modern times, becomes in its operation for all purposes of practical utility, almost a dead letter. It is no longer true, in one out of one hundred actions on the case, or in *assumpsit*, that a verdict and judgment in a court of law, is a bar by way of estoppel to a subsequent suit, between the same parties for the same demand. In those forms of action it is matter of rare, rather than of usual occurrence, that any matter of fact or of right is so distinctly put in issue by the pleadings, as to be pleadable by way of estoppel in a subsequent suit, according to the strong and comprehensive expressions met with in the commentaries upon the law of

pleadings and evidence ; in the works of *Chitty*, *Archbold*, *Saunders* and *Starkie*, no discrimination is made, whether used in pleading or as evidence, between the conclusiveness of verdicts and judgments, when relied on as a protection in a second suit, where the same identical damages are sought to be recovered, and where different damages are claimed for a posterior violation of the same right. In *England* the authorities are so numerous and uniform, that to cases of the latter character, the applicability of the doctrine of estoppel, must be admitted : but that it ever has there been applied to the former class of cases, we have been able to find no express adjudication. The oppression and injustice that would result from such its application, is too obvious to be portrayed. The court of common pleas we think have in some degree sanctioned this distinction, in *Stafford*, and other assignees of *Clark*, the younger, vs. *Clark the elder*, 2 *Bing*. 377. There an action of *assumpsit* having been brought to recover the same damages, which were recovered in a former action of *trover*, (the general issue having been pleaded in both cases,) the verdict and judgment having been suffered to go to the jury, on the trial of the latter, in overruling a motion for a new trial on the ground of the inadmissibility of such evidence, the court say, they do not mean “to enter into the question of the conclusiveness of such a document, when it is produced in evidence ; *Lord Mansfield* thought it conclusive, but my lord *Chief Justice Abbot*, seems to consider it otherwise.” For this forbearance of the court to express their opinion, it is difficult to assign a reason, unless they deemed the principle of pleading by way of estoppel, as wholly inapplicable to the case before them ; no doubt remaining at that day, but that if the defence was a fit subject for a plea of estoppel to make it a conclusive bar, it must be so pleaded ; as it loses its attribute of conclusiveness when offered in evidence under the general issue.

This discrimination too, is most strongly fortified by adverting to the forms of pleas of former recovery, and former

acquittal, or verdict and judgment for the defendant, on the same cause of action. They do not conclude by way of estoppel, but generally in bar to the action; whereas a plea in estoppel must in its conclusion rely on the bar by way of estoppel, or the estoppel is regarded as waived. For forms of the several pleas above mentioned, see 2 *Chitty Pl.* 247, 438, 592. 2 *Evans' Harr.* 49, 50, 148, and the cases there referred to in the note.

The same view of this subject was manifestly adopted by Chief Justice Parker in *Standish, petitioner, vs. Parker et al.*, where on a motion for a new trial, in which the plaintiff obtained damages for being obstructed in the enjoyment of a right of way, the court refuse the motion, on the ground, "that nothing is conclusively determined by the verdict, but *the damages for the interruption covered by the declaration*, and that in another action, if one should be brought, the petitioner (the defendant,) will have a right to contest the respondents (the plaintiffs,) right to the easement, for the interruption of which this action was brought."

We conceive therefore, it may be stated as a general rule, that a verdict and judgment, upon the merits in a former suit, is, in a subsequent action between the same parties, where the cause of action, damages, or demand is identically the same, conclusive against the plaintiff's right to recover, whether pleaded in bar, or given in evidence under the general issue, where such evidence is legally admissible; and that such prior verdict and judgment, need not be pleaded by way of estoppel.

JUDGMENT AFFIRMED.

 Mitchell vs. Dall.—1832.

M. P. MITCHELL vs. JAMES DALL.—Dec. 1832.

On the 25th of October, 1820, M, of *Baltimore*, sold L, of *Havre de Grace, Md.* merchandise to the amount of. \$395 89, at 6 months' credit. On the 3d of January, 1821, L made further purchases from M, to the amount of \$552 97, at 4 mos. credit, which last sum was guarantied by D. On the 5th of May M notified D that his guaranty was due, and, on the 7th, M drew upon L for the amount of the first purchase. On the 8th L advised M, that he could not pay this draft, and wrote he presumed "before it becomes payable you will be paid the amount of it, having directed A to pay D the amount of the *first* invoice, to pay over to you. We wrote D to this effect: in two or three days he (A) or Mr. D will call and pay the amount of your draft." On the 10th D paid M \$400, for which the latter gave a receipt, viz. "received of L through D, on account," &c. On the 16th June, D paid M \$400, for which he gave another receipt, viz. "received of D for account of L," &c. The transactions between M and L were conducted by agents, who deposed at the trial, that the payments in 1821 wer ehanded to D to be applied for his security and relieve him. In an action upon this guaranty *it was held*, that if the jury believed that when the first payment of the 10th May was made, M had received L's letter of the 8th, then M was bound to apply that payment in discharge of the purchase, unless L before the payment gave different directions, or M had reason to believe he intended a different application.

It is a general rule, that a debtor on different accounts, may when he makes a payment, apply it to which account he pleases; but, if he does not at the time of payment apply it specifically to either, but makes it generally, or on account, the creditor who receives it, may apply it to which account he pleases.

The application of a payment need not be expressly directed at the time by the party paying the money, but his intention may be inferred from the circumstances of the particular case.

The mere fact that a payment was made to a creditor, having several demands upon the same debtor, with the debtor's money, through one who was the security of the debtor for one of the debts, is not a circumstance from which any inference can arise, that the debtor intended it should be applied to the debt of which such agent was the guaranty.

Where there is evidence tending to prove a controverted fact it should be left to the jury.

APPEAL from *Baltimore* County Court.

This case has been in this court before, and was reversed on the appeal of the present appellant, at June term, 1828, *2 Harr. & Gill*, 159, and sent down with a *procedendo* to the County Court.

It was an action of *Assumpsit* instituted by the appellant against the appellee, on the 10th day of October, 1828.

The defendant pleaded *non-assumpsit*, and issue was joined.

1. At the second trial the plaintiff, to support the issue joined on his part, gave in evidence the following letter of guaranty, and the memorandum annexed to the same, both of which, it was admitted, were in the hand writing of the present defendant.

“*Baltimore, 3d January, 1821. Mr. M. P. Mitchell: Sir, as Mr. Archibald Austin, agent of Jacob Lewis & Co., wishes to obtain some goods of you, on a credit of four months, I hereby agree to guaranty the payment for the amount he may take at this time, if that will facilitate the business between you and him. Yours respectfully. James Dall.*”

Amount for which *J. Dall* is responsible:

Goods, $\frac{1}{2}$ bill of <i>M. P. M.</i>	\$372 07
Do. <i>Charles Moss's bill,</i>	180 90
	<hr/>
	\$552 97

He further gave in evidence that, on the 25th of October, 1820, he sold to *Jacob Lewis & Co.* the persons named in said guaranty, merchandise to the amount of \$395 89, on a credit of 6 months, and that on the date of said guaranty, and upon the faith thereof, he supplied the said *Lewis & Co.* with additional merchandise to the amount of \$552 97, and which is noted in the memorandum aforesaid, at the foot of said guarantee. He also gave in evidence that he afterwards received from said *Lewis & Co.*, by the hands of *James Dall*, the defendant, \$400 on the 10th of May, 1821, and another \$400 on the 16th June, 1821; and, in order to shew that the first of said sums, \$400, was intended by said *Lewis & Co.* to be applied by the plaintiff, in the first instance, to the discharge of the first debt, contracted on the 25th of October, 1820, of \$395 89, gave in evidence to the jury, the following letter written by *Archibald Austin*, as agent of said *Lewis & Co.*, to the plaintiff, having first

proved that said *Austin* was authorized by *Lewis & Co.* to write said letter.

“*Havre de Grace*, 8th May, 1821. *M. P. Mitchell Esq.*
Sir, we regret to observe by yours of the 7th inst. that you have drawn upon us, at three days’ sight, for \$395 89, not having funds here at this time to meet it, but we presume before the draft becomes payable you will be paid the amount of it, having directed *Mr. John P. Austin*, whom we despatched on Saturday week to *Norfolk* for money due from the government on deliveries of stone, to pay *Mr. Dall* the amount of the first invoice, to pay over to you, on his return through *Baltimore*.

“We wrote *Mr. Dall* to this effect, but, as it would appear he has not informed you, we presume he must have been absent. As *Mr. A.* was directed to return with all possible despatch, and having intelligence of his leaving *Old Point Comfort* for *Norfolk* on Wednesday last, we have no doubt he will be in *Baltimore* in two or three days, when he or *Mr. Dall* will call and pay the amount of your draft. Very respectfully, &c. your obedient servants.

Jacob Lewis & Co. per A. Austin.”

For the same purpose the plaintiff further gave in evidence that, on the 7th of May, 1821, the day preceeding the date of said letter, he drew a draft on *Lewis & Co.* at three days’ sight, for \$395 89, being for the amount of said first debt of the 25th of October, 1820, which, not being accepted by them, was returned to the plaintiff on the 11th of the same month, and was by him lost or destroyed. And he further gave in evidence the following letter from *Lewis & Co.* written by their agent to the defendant, said letter having been exhibited by the defendant at the trial of this cause.

“*Havre de Grace*, June 13th, 1821. Dear sir,—we enclosed you on the 8th inst. \$200 to pay *Mr. Mitchell*; we now have the pleasure to enclose two hundred more, which will enable you to pay the balance due him, or part to him

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and *Moss* as you think best. We hope soon to remit more. In the mean time remain respectfully yours, &c.

Jacob Lewis & Co. per A. Austin."

"James Dall, Esq."

"Dear James: I feel a little anxious about the \$200 sent you on the 8th, as we have not heard from you since—thank you to acknowledge the receipt of that and the enclosed, and let me know how you paid it, &c. Yours affectionately.

A. Austin."

And also the following copy of a letter (having first given the defendant notice to produce the original) from the plaintiff to the defendant, together with the answer of defendant to said letter,

"17th November, 1821. James Dall, Esq. Dear sir,—as Messrs. J. Lewis & Co. have failed to remit me the balance of the account, and being desirous of having it settled, I hope it may not be inconvenient for you to discharge the same, a statement of which I now hand you.

M. P. Mitchell."

"Baltimore, Nov. 19th, 1821. Mr. M. P. Mitchell: Sir, yours of this date came duly to hand through the post office, and I merely changed the direction thereof to that of Jacob Lewis & Co., Havre de Grace, hoping that it will produce a speedy attention and remittance to amount of the balance, if not, further attention on my part will be applied.

Yours respectfully.

James Dall.

He also gave in evidence that the plaintiff had sent no other letter to the defendant, in the month of November, 1821, than the letter of the 17th.

The plaintiff then proved by *A. Austin*, who was examined, under a commission, sent to *New York*, that he was agent for the firm of *Jacob Lewis & Co.*, at *Havre de Grace*, in *Maryland*, in the years 1820 and 1821. That *Jacob Lewis & Co.* did purchase of *M. P. Mitchell*, the plaintiff, on the 25th of October, 1820, goods to the amount of \$395 89, and made a further bill with the said *M. P. Mitchell*, on the 3d of January, 1821, to the amount of \$552 97; the sum

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of \$180 90, being *Moss's* bill, being included therein; which bill of \$552 97 was guarantied by *Mr. James Dall*. That *Mr. M. P. Mitchell* wrote the following letter to *J. Lewis & Co.*

“*Baltimore*, May 7th, 1821. *Messrs. J. Lewis & Co.* Gentlemen, I have this day drawn on you, at three days' sight, in favor of *J. C. Richards*, Esquire, for \$395 89, amount of your purchase of 25th October last, on six months' credit. Your last purchase is also due. *M. P. Mitchell.*”

And that the same was received by *Lewis & Co.* That he presumes the original is among the papers of *Lewis & Co.* in *Havre de Grace*, as he last saw it there, but he cannot say whether it be now lost or destroyed, or not. That *Jacob Lewis & Co.* wrote a letter to *M. P. Mitchell* on the 8th of May, 1821. (*Ante*. 363.) That he was authorised to write such a letter, and did accordingly do so, in consequence of the inability of *Lewis & Co.* to meet the draft at the time. That he cannot recollect precisely what directions he gave *Mr. Dall*, but he knows that money was received by *Mr. Dall* from *Jacob Lewis & Co.* for the purpose of securing him, and being paid by him over to *M. P. Mitchell* on his claims. In answer to interrogatories, on the part of the defendant, the deponent says his impression is, that the money which was handed by him, or his order in 1821, to the defendant, was intended to be applied in the first instance, to the payment of that part of *Lewis and Co's* debt, which was warranted by the defendant. That the second and third sums, consisting of two hundred dollars each, were remitted by him, the deponent, to the defendant, and were intended to pay *M. P. Mitchell*, but were not remitted directly to him. That the first sum of four hundred dollars was paid in *Baltimore*, by *John P. Austin*, to the defendant, and deponent has no doubt, was paid to the defendant, and not to the plaintiff, to save the defendant from the responsibility of his guaranty.

The defendant then offered in evidence, the deposition of *John P. Austin*, taken under a commission issued to

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New York, who proved that he was, during the years 1820 and 1821, agent of the firm of *Jacob Lewis & Co.* That he does not of his own knowledge, know of the purchases of goods by said *Lewis & Co.* of the plaintiffs, on the 25th of October, 1820, and 3d of January, 1821, but *Mr. Dall* informed the witness, at or about the beginning of the year 1821, that he had guarantied to said *M. P. Mitchell*, payment of the sum of \$552 97, including a certain bill of one *Moss*. Deponent further stated, that in the year 1821, he handed to *Mr. James Dall*, four hundred dollars, to be applied to the payment of *Mr. Dall's* guarantee of \$552 97, on account of *Jacob Lewis & Co's* indebtedness to *M. P. Mitchell*, and the witness is not able to say whether he, at that time, knew of any other indebtedness existing on the part of *Jacob Lewis & Co.* to *M. P. Mitchell*. That he, deponent, paid the four hundred dollars in *Baltimore*, to the defendant and not to the plaintiff, to relieve the defendant from his guaranty. He further gave in evidence the following letter, to him from the plaintiff, and which was admitted to be in the hand writing of the plaintiff, and the following receipts, also admitted to be in plaintiff's hand writing.

“*Baltimore, 5th May, 1821. Mr. J. Dall.* Dear sir, I think it necessary to inform you that the amount for which you have become responsible with me, for *Mr. A. Austin*, as agent for *J. Lewis & Co.* becomes due this day.

Very respectfully, &c.

M. P. Mitchell.”

“\$400. *Baltimore, 10th May, 1821.* Received of *Jacob Lewis & Co.* through *James Dall*, four hundred dollars, on account.

M. P. Mitchell.”

“*Baltimore, 16th June, 1821.* Received of *Mr. James Dall* for account of *Messrs. Jacob Lewis & Co.* of *Havre de Grace*, four hundred dollars.

M. P. Mitchell.”

And thereupon the plaintiff, by his counsel, upon the whole of said evidence, prayed the opinion and instruction of the court to the jury, as follows:

1st. The plaintiff prays the opinion of the court to the jury, that from the evidence in the cause, they must find that *Lewis & Co.* directed the plaintiff to apply the first payment of \$400, of the 10th of May, 1821, received through the defendant, and as given in evidence by him, to the discharge, in the first place, of the draft of \$395 89, being the amount of the first invoice referred to in the letter of *Lewis & Co.* by their agent, *Austin*, to the plaintiff of the 8th of May, 1821.

2d. That the said letter of the 8th of May, 1821, from *Austin* as the agent of *Lewis & Co.*, if the jury believe the same to have been written by their authority, and to have been received by the plaintiff, prior to the said first payment of \$400, was an application by them of said payment, to the discharge of the said draft and first invoice, and binding the plaintiff to make such application of it, unless the jury believe that, between the date of said letter and the receipt of said payment, the plaintiff received a subsequent direction from *Lewis & Co.*, or their authorized agent, for that purpose, either expressly or impliedly, to make a different application of it, and that there is no evidence in the cause, from which the jury can find any such subsequent direction.

3d. That if the jury believe that *Lewis & Co.* intended at the time said first payment was made, that it should be applied to the discharge of the said draft, the plaintiff was authorized so to apply it, no matter what might have been the intention of the defendant, at the time he handed over the money to the plaintiff, or of *John P. Austin*, from whom it had been previously received by defendant.

4th. That the plaintiff was authorized to apply said payment to the discharge of that part of the debt due by *Lewis & Co.* to him, which was first contracted, unless he believed, or had good reason to believe at the time of receiving it, that they, *Lewis & Co.*, intended to make a different application of it, and that there is no evidence in this cause that the plaintiff did so believe, or that he had good reason to believe that any such intention existed, on the part of *Lewis & Co.*

5th. That upon the whole evidence the plaintiff is entitled to recover.

But the court refused to give each and every of said opinions and instructions to the jury, except the one asked for in the *third* prayer.

The plaintiff excepted, and the verdict and judgment being against him, he appealed to this court.

The cause came on to be argued before BUCHANAN, Ch. J., EARLE, STEPHEN, and DORSEY, J.

Johnson, for the appellant.

As the money which the plaintiff received on the 10th of May, 1821, was the money of *Lewis & Co.* and not of *Dall*, the defendant, the former, and not the latter, had a right to direct the application, and if no application was made by *Lewis & Co.* then the right devolved upon *Mitchell*, the creditor.

The letter of May 8th, 1821, from *A. Austin*, to the plaintiff, and the draft of the plaintiff on *Lewis & Co.* for the amount of the first invoice, were not before the jury in the former cause, both having been decided by the County Court, to be inadmissible, 2 *Harr. and Gill*, 170.

Now, that letter, he contended, was the authority to *Mitchell*, to make the application to the first debt, and he was bound so to apply it. The question, of how this payment should be applied, is a question with which *Dall* has no right to interfere, it being exclusively a question between *Lewis & Co.* and the plaintiff. Nor could *John P. Austin*, who handed the money to *Dall*, control, in any way, its application. If, however, it be admitted that he could, and the intention, as proved to have been entertained by him that the payment should go in discharge of *Dall's* guaranty, would have been binding on *Mitchell*, if communicated to him, it does not appear to have been so communicated. The fact that *Dall* handed the money to *Mitchell*, is of no importance, because the letter of the 8th of May,

1821, which directed the payment to the first debt, said that *Dall* would probably hand the money.

The two payments of May and June, 1821, amount to \$800, being more than *Dall's* guaranty, yet in November of the same year, in answer to a letter from the plaintiff, calling on him for the balance, instead of denying that he owed a balance, he promises to give the claim further attention, if *Lewis & Co.* did not.

That a creditor has a right to apply a payment to a debt guarantied, when he has one not so secured, he cited *Kirby vs. The Duke of Marlborough*, 2 *Maule and Selw.* 18. 3 *Stark.* 1092. *Brewer vs. Knapp*, 1 *Pick.* 337. 1 *Serg. and Low.* 202. He referred also in the argument, to *Mitchell vs. Dall*, 2 *Harr. and Gill*, 159, 173. *Mayor of Alexandria vs. Patten*, 4 *Cranch.* 320. *Gwynn vs. Whitaker*, 1 *Harr. and Johns.* 754.

Williams, for the appellee.

John P. Austin was as much the agent of *Lewis & Co.* as *Archibald*, and the agency of the former, as appears from the evidence, had a particular reference to their money transactions, and when he went to *Baltimore* with the money, he possessed all the authority of *Lewis & Co.* over the subject. Now *Austin* says that his intention, when he gave the money to *Dall*, was that he should relieve himself from his guaranty, and it is difficult to ascribe to him any other motive; nor can it be believed that *Dall* did not pay the money to *Mitchell*, for that purpose. The receipt shows that *Mitchell* did not apply the money to the old debt of \$395 89, for if he had, it would have been in full of that debt, and the balance would have been applied to the guarantied debt. Why should the money have been placed in the hands of *Dall* at all, if the object had not been to relieve him from his responsibility? Upon the application of payments, he cited *Gwynn vs. Whitaker*, 1 *Harr. and Johns.* 755. The first right of application is with the debtor; if he does not do it, the creditor may, and if both omit, the applica-

tion is made by the law. The application, whether made by debtor or creditor, is made at the *time* of payment only, though there are perhaps, modern cases establishing a different rule. *Robert vs. Garnie*, 3 *Caine's Rep.* 14. *Simson vs. Ingham*, 2 *B. and C.* 65. 9 *Serg. and Low.* 29.

And whether the debtor has applied a payment to one debt or another, expressly or impliedly, is a question for the jury, and this is so, whether the evidence be in writing or by parol. *Etting vs. Bank U. S.*, 11 *Wheat.* 75.

BUCHANAN, Ch. J., delivered the opinion of the court.

This case was once before in this court, and was sent back under a *procedendo*, and it now comes up again upon a bill of exceptions taken at the trial, on the part of the appellant, containing *five* prayers, the *first* and *last* of which, can neither of them be sustained. Not the former, because the prayer to the court was for a direction to the jury, that from the evidence they *must* find that *Lewis & Co.* directed the plaintiff to apply the first payment of \$400 received through the defendant, to the discharge, in the first instance, of the draft of \$395 89, which they were not bound to do, if they were not satisfied that the letter of the 8th of May, 1821, from *Archibald Austin*, the authorized agent of *Lewis & Co.* to the plaintiff, containing the direction relied upon, for the application of the money, had been received by the plaintiff, which was a matter for the jury, and could not properly have been taken from them by the court. The court, therefore, did right in refusing to give the instruction asked for, which could not have been given without determining as well the fact, that the letter was written by the authority of *Lewis & Co.*, as, that it had been received by the plaintiff, and that would have been an usurpation of the province of the jury; nor the latter, because it was a general prayer not sanctioned by the act of 1825, ch. 117, under the construction heretofore given by this court to that act.

There is no question before us on the *third* prayer; that having been granted, and no exception taken by the defend-

ant. But we think the instructions asked for in the *second* and *fourth* prayers, should have been given.

On the 25th of October, in the year 1820, the plaintiff sold goods to *Lewis & Co.* to the amount of \$395 89, on a credit of six months; and on the 3d of January, 1821, he let them have another parcel of goods, to the amount of \$552 97, on a credit of four months, upon the guaranty of the defendant *Dall*, upon which guaranty this suit is founded. It appears from the evidence set out in the bill of exceptions, that on the 7th of May, 1821, both debts being then due and unpaid, the plaintiff wrote to *Lewis & Co.*, in these words: "I have this day drawn on you at three days' sight, in favor of *J. C. Richards, Esq.* for \$395 89, amount of your purchase 25th of October last, on six months' credit. Your last purchase is also due." And gave in evidence that on the same day, he drew a draft on them at three days' sight, for \$395 89, the exact amount of the first debt, of the 25th October, 1820, which not being accepted, was returned to him.

He also gave in evidence a letter of the 8th of May, 1821, written for *Lewis & Co.* by *Archibald Austin*, their agent for that purpose, addressed to him saying, "we regret to observe by yours of the 7th instant, that you have drawn upon us, at three days' sight for \$395 89, not having funds here at this time to meet it; but we presume before the draft becomes due, you will be paid the amount of it, having directed Mr. *John P. Austin*, whom we dispatched on Saturday week to *Norfolk*, for money due by the government on deliveries of stone, to pay Mr. *Dall* the amount of the first invoice, to pay over to you on his return through *Baltimore*. We wrote Mr. *Dall* to this effect; but as it would appear he has not informed you, we presume he must have been absent; as Mr. *Austin* was directed to return with all possible despatch; and having intelligence of his leaving *Old Point Comfort* on Wednesday last, we have no doubt he will be in *Baltimore* in a few days, when he or Mr. *Dall*, will call and pay the amount of your draft."

It is in proof that *John P. Austin*, the person named in that letter, did put into the hands of *Dall*, the defendant, \$400; and that on the 10th of May, 1821, only two days after the date of that letter, *Dall* paid over \$400 to the plaintiff, and took from him a receipt in these words, “received of *Jacob Lewis & Co.*, through *James Dall*, \$400 on account.” And the question is, how that payment should be applied, whether in the first place, to the first debt of \$395 89, the amount of the draft of the 7th May, 1821, or to the debt of \$552 97, guarantied by *Dall*.

It is a general rule, that a debtor on different accounts may, when he makes a payment, apply it to which account he pleases; but if he does not at the time of payment, apply it specifically to either, but makes it generally, or on account, the creditor who receives it, may apply it to which account he pleases. And it makes no difference, though one debt be due on open account, and the other on bond, or the one on open account, and the other secured by a guaranty; in either case, the creditor may apply the unappropriated payment to which debt he chooses, and is not bound to apply it so as first to relieve the surety, but may appropriate it at his discretion, in the first instance to the open account, and that although the open account existed anterior to the bond or guaranty, and the surety in the bond if there be one, or the guaranty had no notice of it, at the time of entering into his liability.

The application of a payment, it is true, need not always be expressly directed at the time, by the party paying the money; but his intention may be inferred from the circumstances of the particular case; and a payment may be attended by circumstances demonstrating its application as clearly, as it could be demonstrated by words. As in the case put by the chief justice in *Naylor vs. Sandiford*, 7 *Wheat.* 20, of a positive refusal to pay one debt, and an acknowledgment of another, accompanied by the delivery of the sum due upon it, which would be a circumstance as fully evincing the intention of the debtor, to apply the payment to the

debt acknowledged, as it could be by an express direction, and would have the effect of an express direction to apply it to that debt, and the creditor would be bound so to apply it. But if there be no application of the payment at the time, by the debtor, either express or implied, or arising out of the nature of the transaction, the election is thrown upon the creditor, to apply it to which account he pleases.

And in the decision of the case between these parties, as formerly brought before this court, 2 *Harr. and Gill*, 159, it is laid down to be “the undoubted right of the debtor, to direct the appropriation of any money paid by him, to any debt he may think proper; and although he may not give an express direction at the time of the payment, such direction may be implied from circumstances, but if no application has been made by the debtor, either express or implied, then the creditor may apply it.” And speaking of the letter of the 8th of May, 1821, from *Lewis & Co.* to the plaintiff, the rejection of which, as incompetent testimony, formed one of the grounds of appeal, it is said, “we think the letter was not only legal, but the best evidence for the purpose for which it was offered. It was the direction of the debtor to the creditor, in writing, how this payment was to be applied. It was the creditor’s authority for making the application, and after the receipt of this letter, he could not have rightfully applied it in any other manner.”

The purpose for which it was offered was to show, that the amount specified in the receipt of the 10th of May, 1821, was intended to be applied, in the first instance, to the discharge of the first debt of \$395 89, which construction of that letter we think is undeniably correct.

The draft by the plaintiff, on *Lewis & Co.*, of the 7th of May, 1821, was for \$395 89, the exact amount of the first debt of the 25th of October, 1820, and in his letter to them of the 7th of May, 1821, advising them of that draft, he informed him that it was for the amount of their purchase of the 25th October, 1820, and advised them further, that their last purchase, (the debt guarantied by *Dall* the defen-

dant,) was also due. Here then, the two debts were clearly designated, and *Lewis & Co.* advised that the draft was on the first account, and not on the last, which was guaranteed by *Dall*. With this information before them, they, in their letter of the 8th of May, 1821, tell the plaintiff, that they presume he will be paid the amount of the draft before it becomes due; that they had directed *J. P. Austin*, to put into the hands of *Dall*, the amount of the first invoice, (the debt of the 25th of October, 1820,) to be paid over by *Dall*, to him; that they had written to *Dall* to that effect; and that they have no doubt *J. P. Austin*, or *Dall*, will in a few days call and pay him the amount of his draft; which was as clear a direction to the plaintiff, to apply the money that should be put in *Dall's* hands by *J. P. Austin*, and by *Dall* paid over to him, to the first debt, or that of the 25th of October, 1820, as could well have been given.

And putting the letter from the plaintiff to *Lewis & Co.*, of the 7th of May, 1821, out of the case, if the letter of the 8th of May, 1821, from *A. Austin* as their agent, was written by their authority, and received by the plaintiff prior to the first payment of \$400, on the 10th of May, 1821, it was an application by them, binding on the plaintiff, of that payment to the discharge of the draft, and first debt of the 25th of October, 1820, unless, between the date of that letter and the receipt of the payment, he received a subsequent direction, either express or implied, from them, or their authorised agent for that purpose, to make a different application of it. And no evidence is perceived in the record showing or tending to show, any such subsequent direction.

Archibald Austin, who as the agent for that purpose, of *Lewis & Co.* wrote the letter of the 8th May, 1821, directing the application of the money, which was to be handed over by *Dall* to the plaintiff, no where so much as intimates that either with, or without the authority of *Lewis & Co.* he ever gave to the plaintiff, any other directions, express or implied. And whatever his own private views, not

communicated to the plaintiff may have been, his letter disclosing the intention and views of his employers, speaks for itself, and there is not a word of proof in the record, that they ever gave to the plaintiff any other directions in any way. Nor would it seem that there was time sufficient for them to do so, there having been but one intervening day between that on which the letter was written, and that on which the payment was made. And that letter was the last communication between them and the plaintiff, before the payment, of which any evidence was offered.

John P. Austin, who says he knew of no debt due from *Lewis & Co.* to the plaintiff, except that of which *Dall* was the guaranty, may for that reason have supposed that the money he put into *Dall's* hands, was intended to be applied to that debt. But there is not a word of proof, that he had any authority whatsoever, to make or direct such an application of it. On the contrary, the only evidence offered of his having had any authority, to place it in the hands of *Dall*, is the letter of the 8th May, 1821, which explicitly directs the application of it, to the draft and first account. Nor is there a word of evidence that *Dall* himself, who paid over the money to the plaintiff, made any application of it, express or implied, to the debt which he had guaranteed, or intended to do so. But on the contrary, he paid it "on account" generally, as is expressly proved by the receipt he took, as for money paid by *Lewis & Co.* through him, showing that, in making the payment he acted as their agent.

And whatever might have been the effect of such a payment by him, with his own money, being a guaranty of one of the debts, yet as it was not made with his own money, but with the money of *Lewis & Co.* put into his hands for that purpose, the mere fact, that it was made through him, is not a circumstance from which any inference can arise, that they intended it should be applied to the debt of which he was the guaranty, or tending to prove such an intention. And there is not perceived to be any evidence in

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the cause, that the plaintiff believed, or had any good reason to believe, that any such intention existed on the part of *Lewis & Co.* But their letter of the 8th May, 1820, is the only proof of what their intention was; and not only authorised, but required of the plaintiff, to apply the payment alluded to, to the first debt, no matter what might have been the intention of the defendant *Dall*, when he paid over the money to the plaintiff, or of *John P. Austin*, from whom he had previously received it. Where there is evidence tending to prove a controverted fact, it should be left to the jury; but we can perceive no evidence here, tending to prove any other application by *Lewis & Co.* of the first sum of \$400, that was put into the hands of *Dall* by *John P. Austin*, and by him paid over to the plaintiff "on account" on the 10th May, 1821, than that which is contained in that letter.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

WM. B. WILLIAMS' EXR'S vs. ROBERT MARSHALL.—*December, 1832.*

There are many exceptions to, and modifications of the rule, that a trustee, executor or administrator, cannot become a purchaser at his own sale, and that if he does, such sale is void.

A trustee who purchases at his own sale, may be treated in Chancery according to circumstances, as a purchaser for the benefit of the *cestui que trust*.

In some cases, a trustee will be protected in his purchase at his own sale; as if the *c. q. t.* be of full age, and under no disability, and with a full knowledge of the transaction, lies by for an unreasonable time, or being under age, or other disability, does not in a reasonable time after coming to age, or the disability is removed, seek to set aside the sale, or treat the trustee as a purchaser for his benefit, it will be considered as an acquiescence in the sale.

It is only a favor of the *c. q. t.* or party interested, that Chancery will vacate such a sale. A court of law is not the proper tribunal to pronounce it void, or set it aside, merely on the ground that the trustee was purchaser at his own sale.

APPEAL from *Prince George's County Court*.

On the 26th of July, 1828, *Replevin* was brought, by the appellants, against the appellee, for sundry negroes.

Pleas, property in defendant, and in a stranger, to which there were issues.

1. At the trial the plaintiffs proved, that *Wm. B. Williams*, the testator of the plaintiffs, was the executor of *Thomas O. Williams*, deceased, and that at a sale of the personal estate of the said *Thomas O. Williams*, as ordered by the Orphans Court, the said *William B. Williams*, the executor, with the consent of all the representatives of *Thomas O. Williams*, purchased a negro woman named *Amy*, the mother of the negroes in the declaration mentioned, and that in his account of sales returned to the Orphans Court, he was returned as the purchaser, to which no objection was ever made. He further proved, that the sale above spoken of took place in the year 1818, and that *Wm. B. Williams* lived until the year 1825, or 1826, and that during all that time the said *Amy*, the mother, remained in his possession, with the knowledge and consent of all the distributees of *Thomas O. Williams*; and that the negroes in the declaration mentioned, were born during that period.

Upon this evidence the defendant prayed the instruction of the court to the jury, that the plaintiffs were not entitled to recover; upon the ground that the purchase by *William B. Williams*, at the sale of *Thomas O. Williams'* estate, was void, he being the executor of said *Thomas O. Williams*, and that therefore the property was in the administrator *de bonis non* of said *Thomas O. Williams*; although by an account settled by the administrator *de bonis non*, with the Orphans Court, there remained a balance in his hands of \$4854 60; and it was in evidence, that this administrator only knew of two outstanding claims against the estate, amounting to about \$200; there appearing on the docket of the County Court a suit against him, in which the plaintiff claimed \$7000, which claim, according to the declaration

filed in that cause, originated in the year 1810, and in bar of which the plea of limitations had been filed.

The County Court, (STEPHEN, Ch. J., and KEY, A. J.,) gave the instruction as prayed. The plaintiff excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, ARCHER, and DORSEY, J.

V. H. Dorsey and *Boyle*, for the appellants, contended.

1. That a purchase by a trustee at his own sale is not *void*, but *voidable* only, at the instance of some party interested in the faithful performance of the trust; and that a mere stranger cannot interfere. 14 *Johns. Rep.* 415. 5 *Ib.* 43. 2 *Caine's Cases*, 320. And the right even of the *cestui que trusts*, to impeach the validity of the sale is waived, by an acquiescence for any considerable length of time. 1 *Ves. Sr.* 226. 5 *Ves. Jr.* 680. 6 *Ib.* 631. 14 *Johns. Rep.* 407. 2 *Johns. Ch. Rep.* 412. 2 *Cowen*, 195. 5 *Harr. and Johns.* 147, 447. 1 *Peters' Ch. Rep.* 368. 1 *Harr. and Johns.* 152. 3 *Gill and Johns.* 163. 5 *Johns. Rep.* 43. 2 *Brown Ch. R.* 427.

2. It is not competent for a court of law to declare a sale of this sort void—application should be made to a Court of Chancery. 2 *Johns. Ch. Rep.* 2. 1 *Harr. and Johns.* 152.

Stonestreet, for the appellee.

The appellee is defending a possession, which it is to be presumed was legally acquired. He does not seek to set aside the sale. It is the plaintiffs who are asserting a title under that sale, and they are bound to show a good one. Nothing can be inferred favorable to the plaintiffs' title, from the possession of their testator, because he is to be considered as holding possession as the executor of *Thomas O. Williams*, in which character alone, he was entitled to hold. 5 *Harr. and Johns.* 147. 6 *Ib.* 67.

BUCHANAN, Ch. J., delivered the opinion of the court.

The language of the general rule is, that a trustee, or executor, or administrator, cannot become a purchaser at his own sale, and that if he does, such sale is void. But that rule is not to be universally understood, and applied in the most strict and literal sense; and there are many exceptions to, or modifications of it.

A trustee, who purchases at his own sale, may be treated in chancery, according to circumstances, as a purchaser for the benefit of the *cestui que trust*, and not be permitted to make profit, by speculating in the purchase of the trust property; and he may be directed to sell it again for the benefit of the *cestui que trust*, provided it will bring more on a re-sale, than the amount at which he bought it; and if not, he may be kept to his purchase, and held responsible for the stipulated price. But he will in some cases be protected in his purchase, as if the *cestui que trust* be of full age at the time of sale, and under no disability, and with a full knowledge of the transaction, lies by for an unreasonable time, or being under age, or other disability, does not, in a reasonable time after coming of age, or the disability is removed, seek to set aside the sale, or treat the trustee as a purchaser for his benefit, it will be considered as an acquiescence in the sale, and the trustee will not be disturbed in his purchase. And it is only in favor of the *cestui que trust*, or party interested, that in chancery a purchase by a trustee at his own sale will be set aside or held to be void, or the trustee disturbed in his purchase. Here we are in a court of law, and the purchase which the defendant seeks to treat as absolutely void, was by an executor at his own public sale, in the year 1818, with the knowledge and assent of all the representatives of the deceased, and no objection appears ever to have been since made by any of the parties interested. The defendant is a perfect stranger, having no interest in any capacity, in the settlement of the estate, or in the property sold, so far as is disclosed by the record. In such a case, after the full assent to the purchase by the trustee, given at

the time, (fourteen years ago,) of all the representatives, and their entire acquiescence ever since, we cannot permit a mere wrong-doer, showing no title in himself, to shield himself behind a general rule adopted by chancery, to guard against fraud, and to protect the interests of the *cestui que trust*, confided to the trustee, in questions arising between trustees, and those interested in the proper management and disposition of the trust property; and even in that court, modified according to circumstances, and never applied to the case of a stranger having no such interest, but seeking to set aside the sale, merely to cover his own wrong, and not for the benefit of those interested in the faithful discharge of the trust; and much less can it be in a court of law. Indeed we think that a court of law is not the proper tribunal to pronounce absolutely void, and to set aside a sale made by a trustee or executor, merely on the ground that he was himself the purchaser; but that it was a subject proper only for the cognizance of another forum, a Court of Chancery, where each case can be more fully and better investigated, and the rights and interests of all concerned, inquired into and protected. But to treat such sales in courts of law as absolutely void, would often be found to work injustice and injury, and to make the rule an instrument of fraud, in the hands of a wrong-doer, having no interest in the faithful discharge of the trust. If there have been any decisions in this State, with which this may seem to be inconsistent, perhaps on examination it will be seen, that the question, to what tribunal (a court of law, or a court of equity,) the power to set aside such sales properly belonged, was not raised, but that it was taken as a *concessum*, that if absolutely void, they could confer no title, and that the effect was the same in both tribunals. Whereas, notwithstanding the broad language of the rule adopted in chancery, they are practically treated in that court, as *voidable* only, according to circumstances, and as the interest of the *cestui que trust* may require, and some

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times are not permitted to be disturbed, which could not be, if all such sales are absolutely null and void.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

STATE, use of JOHNSON, *et ux. vs. GREEN*, Executor of GREEN.—*December, 1832.*

The plea of limitations cannot be amended, though the amended plea is filed before the rule day has expired. But if a plaintiff amends his declaration, the defendant may plead limitations anew.

A guardian's bond, as respects the plea of limitations, is, by the act of 1798, *ch. 101, sub-ch. 12, sec. 4*, placed on the same footing with testamentary and administration bonds.

The term within which suits must be brought on guardians' bonds, according to the act of 1729, *ch. 24, sec. 21*, is twelve years after the passing of the bonds.

A plea of limitations to conform to the act assembly, must allege that twelve years have elapsed from the passing of the bond in the declaration mentioned, before the issuing of the original writ in the cause, or it must contain some equivalent averment.

Where a plaintiff sued out a writ in debt for £5000, and afterwards, by permission of the County Court, amended his writ to debt for £1500, the defendant pleaded limitations in bar, and had judgment of the County Court upon general demurrer. Upon appeal, the judgment was reversed, but as a writ cannot be amended, and the plea of limitations would be a conclusive answer to an amended declaration conforming to the original writ, this court refused a *procedendo*.

APPEAL from Charles County Court.

On the 10th of July, 1826, the appellants, *Johnson* and wife, formerly *Mary Coomes*, instituted an action against the appellee, on the testamentary bond of one *Teresa Coomes*, as executrix of *Wm. Coomes*, dated July 29th, 1799, in the penalty of £5000 — the said *Teresa Coomes* having subsequently intermarried with *James R. Green*, the testator of the appellee.

After various continuances, and amendments of the pleadings, the appellants asked and obtained leave to amend

their declaration; and in pursuance thereof, at March term, 1831, declared on a bond executed by the appellee's testator, as guardian to the aforesaid *Mary Coomes*, (now *Mary Johnson*,) dated August 14th, 1804, in the penalty of £1500.

The defendant pleaded, 1st. General performance. 2d. That the said State, its action aforesaid to have or maintain ought not, because the debt, in the condition of the writing obligatory aforesaid mentioned, hath been standing, and in action above twelve years, before the day of the issuing the original writ in this cause, &c.

The plaintiff demurred specially to the plea of limitations. 1st. Because the bond is with a collateral condition, and the plea states as the debt, the sum mentioned in said condition. 2d. Because the plea does not set out the bond.

The defendant joined in the demurrer, which the County Court sustained, and ruled the plea of limitations to be insufficient.

Leave was then, at the same term, asked and obtained by the defendant to amend her plea.

The amended plea stated, that the State, its action against her to have or maintain ought not, because the debt in the condition of the writing obligatory aforesaid mentioned, hath been standing, and in action above twelve years, before the day of issuing the original writ in this cause, &c.

The plaintiff then prayed the court, not to receive this plea of limitations, which prayer being overruled, a general demurrer was filed, in which the defendant joined.

In the argument of the cause below, the plaintiff contended. 1st. That the plea of limitations cannot be amended. 2d. That under the rule of court, the plea of limitations cannot be amended, unless the declaration to which it is an answer is first amended, and relied upon the 24th rule, which is stated thus. "If the defendant neglects to plead by the rule day, he shall not plead the act of limitations, unless the declaration shall be amended."

The County Court overruled the demurrer, and gave judgment for the defendant; the plaintiff thereupon brought the case by appeal to this court.

The cause was argued before BUCHANAN, Ch. J., EARLE, ARCHER, and DORSEY, J.

V. H. Dorsey, for the appellants.

1. The plea of the statute of limitations cannot be amended. 1 *Harr. and McHen.* 400. 3 *Ib.* 324. *Wall vs. Wall*, 2 *Harr. and Gill*, 81.

2. But if the plea is amendable, the amended plea is defective, and bad on general demurrer. The act of 1778, *ch.* 101, *sub-ch.* 12, *sec.* 4, places guardian and testamentary bonds on the same footing, and the plea should allege that twelve years have elapsed from the passing of the bond. 2 *Evans' Harr.* 67.

Brewer and Stonestreet, for the appellee.

1. This plea of limitations is good on the demurrer. Act of 1715, *ch.* 23, *sec.* 6. 1792, *ch.* 24, *sec.* 21. 3 *Harr. and McHen.* 324. 2. Although, as a general rule, it may be admitted that the plea of limitations is not amendable; yet when, as in this case, the amendment is made, before the rule day to plead, there can be no valid objection to it. 3 *Harr. and McHen.* 324. 3. But even if the plea could not under the circumstances be amended, still as the plaintiff has not excepted to the decision of the court, refusing his prayer, but on the contrary has demurred to the plea, he must be considered as having acquiesced in that decision. 3 *Harr. and Johns.* 9. 4. The point as to the amendment of the plea, is not raised or made under the act of 1825, nor can it now be made on the record. 5. There being no answer to the plea of performance, the defendant must have judgment. 6. But leave was granted to amend the nar, and under that leave the case was changed from an action on a testamentary bond, to an action on a guardian's bond. This they insisted could not be done. The character in which the party was originally sued was changed by this amendment, and the questions in litigation were altered by it. 7 *Harr. and Johns.* 251. 2 *Gill and Johns.* 365.

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DORSEY, J., delivered the opinion of the court.

The record presents two questions for determination. The first is, can the plea of limitations be amended, where the amended plea is filed, before the rule day has expired?

We are of opinion that it cannot. This court have said in *Wall vs. Wall*, 2 *Harr. and Gill*, 79, that “the plea of limitations has been adjudged not to be a plea to the merits; and the universal practice has accordingly been, never to permit it to be amended; and to demand that it should be filed by the rule day.” The County Court therefore erred in refusing the plaintiff’s prayer, that the amended plea of limitations should not be received.

The second question is, were the court right in overruling the demurrer to this plea?

By the act of 1798, *ch. 101, sub-ch. 12, sec. 4*, it is enacted, that the bond given by a guardian, “shall be recorded, and shall be subject to be put in suit, and be in all respects on a footing with the bond given by an executor or administrator.” A guardian’s bond therefore, as respects pleas of limitation, is placed on precisely the same footing with testamentary and administration bonds.

The time within which suits must be brought on guardians’ bonds, is then, according to the act of 1729, *ch. 24, sec. 21*, “twelve years after the passing said bonds.” A plea of limitations to conform to this act of assembly, must allege that twelve years have elapsed, from the passing of the bond in the declaration mentioned, before the issuing of the writ original in the cause; or it must contain some equivalent averment. What does the plea under consideration in this respect state? “That the debt in the condition of the writing obligatory aforesaid mentioned, hath been standing and in action above twelve years.” Now, by inspection of the bond set out in the plea, it will be seen that there is no debt mentioned in its condition. The plea therefore is utterly defective and inapplicable to such a bond; and the demurrer should have been ruled good. For the errors assigned, the judgment of the County Court is reversed;

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but no *procedendo* should issue; it being manifest that the plaintiff can obtain no judgment in his favor in the court below. Not upon the testamentary bond, because the plea of limitations is an unanswerable bar to any suit that may be brought upon it. Not upon the guardian's bond, because, if the plea of limitations were not a conclusive bar, no recovery can be had without amending the writ; which this court on more than one occasion have determined, is not an amendment that the court below are authorised to permit.

JUDGMENT REVERSED.

GLENN, Trustee of FAHNESTOCK, vs. CHARLES W. KARTHAUS.—*December, 1832.*

On the 4th of September, 1818, F, a resident of the city of *Baltimore*, applied to the Commissioners of Insolvent Debtors, under the act of 1816, *ch.* 221, for relief. A provisional trustee was appointed, and the applicant obtained a personal discharge. In December following, two permanent trustees were appointed, who did not give bonds with security. The applicant was reported against by the commissioners, and received no final discharge. Some time after this he died, and the provisional trustee was appointed his administrator. One of the two persons appointed permanent trustees also died, and the other removed from the State. *Baltimore* County Court, upon application of the creditors in 1829, appointed another permanent trustee, who gave bond with security. HELD, that the appointment was duly made, and that the administrator must deliver the property he received, as provisional trustee, to the permanent trustee.

APPEAL from *Baltimore* County Court.

This was an action of *Trover*, for sundry articles of merchandize, instituted by the appellant, against the appellee, on the 11th of March, 1830.

Issue was joined upon the plea of not guilty. Upon an admitted statement of facts, the County Court gave judgment for the defendant, when the plaintiff prosecuted the present appeal.

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The judge, by whom the opinion of this court was delivered, stated all the material facts of the case as follows:

It appears, by the record before us and the various admissions it contains, that on the 4th of September, 1818, *Henry Fahnestock* made application to the *Baltimore* County Court, for the benefit of the insolvent laws of the State, which, according to the provisions of the act of 1816, *ch. 221*, on the construction of which this cause depends, was referred by that court, to the Commissioners of Insolvent Debtors for City and County of *Baltimore*. That on the 5th of September, 1818, the defendant was appointed by the commissioners a provisional trustee, and a personal discharge was regularly granted by *Baltimore* County Court, to the petitioner, *Fahnestock*. That on the 11th of December, 1818, *Isaac Burniston* and *William Scott*, were appointed permanent trustees in the room of the defendant, the provisional trustee, but that the petitioner, *Fahnestock*, failed to obtain a final discharge. That after the defendant was appointed provisional trustee, the petitioner, *Fahnestock*, died, and the defendant took out letters of administration upon his estate, on the 20th of October, 1829. That *Burniston* and *Scott*, the trustees appointed by the commissioners, having neglected to give bond and security, as required by the law, and *Burniston* having died, and *Scott* having left the State, and gone to *England*, the plaintiff, *Glenn*, was appointed a trustee in their room, by *Baltimore* County Court, on the 4th of November, 1829, upon the petition of certain creditors of *Fahnestock*, the petitioning debtor. That the defendant, as provisional trustee, obtained possession of, and sold a quantity of merchandise belonging to *Fahnestock*, the petitioner, for which this suit was brought, and that before the institution of the suit, the plaintiff duly demanded from the defendant, the property he had received as provisional trustee, which he refused to deliver up.

The cause came on to be argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, and DORSEY, J.

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Frick, for the appellant, contended.

1. *Karthaus* held the property of the insolvent *throughout*, as custodiary for the creditors, and the report of the commissioners against the insolvent could not affect the right of the creditors to the property, transferred by the applicant to the provisional trustee.

In other words, the property so transferred by the insolvent to the provisional trustee, could not on an unfavorable report of the Commissioners of Insolvent Debtors, revert to the applicant.

2. This special property or custody of *Karthaus*, *continued* until the constitution of a legally qualified permanent trustee, in whom the whole right of property now vests, for the benefit of the creditors of the insolvent.

3. The death of the insolvent, and the administration on his estate by the defendant, cannot change the relation of these parties. The one as provisional, the other as permanent trustee.

He referred in the argument to the acts of 1812, *ch. 77, sec. 6.* 1808, *ch. 71, sec. 4.* 1805, *ch. 110, sec. 3, 16.* *Kennedy vs. Boggs*, 5 *H. and J.* 408. *Glasgow vs. Sands*, 3 *Gill and Johns.* 96. The act of 1819, *ch. 84, sec. 6.* 1825, *ch. 205, sec. 5.* 1822, *ch. 102.* 1820, *ch. 194, secs. 1, 2, 5.* 6 *Harr. and Johns.* 383.

Mayer, for the appellee.

1. The appointment by the County Court, of the appellant as trustee, is invalid, the Commissioners of Insolvent Debtors having exclusive jurisdiction over such appointments. *Glasgow vs. Sands*, 3 *Gill and Johns.* 96. By the act of 1816, *ch. 221, sec. 5*, the County Court are only authorised to take cognizance of cases of insolvency, in the event of a favorable report by the commissioners. And by the act of 1819, *ch. 84, sec. 6*, the commissioners are not authorised to appoint a permanent trustee, after an unfavorable report, *a fortiori*, they cannot do so after the death of the petitioner.

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It is not true, that a debtor is compelled absolutely to divest himself of all *interest* in his property, as a condition to the court's entertaining his petition for the benefit of the insolvent laws. The mere application of the petitioner, and appointment of a provisional trustee, does not produce this effect under the act of 1816, though the possession of the property is changed; nor can the provisional trustee, institute suits in his own name, to recover any thing due the insolvent. *Kennedy vs. Boggs*, 5 *Harr. and Johns.* 407. The power of either, the County Court or the commissioners, to appoint a permanent trustee, and the divesting of the insolvent of his property, depends upon the final discharge of the petitioner. Act of 1805, *ch.* 110, *sec.* 2, 3, 5, 16. 1808, *ch.* 71. 1816, *ch.* 221. 1807, *ch.* 150, *sec.* 3. *Brown vs. Brice*, 2 *Harr. and Gill*, 27. Act of 1814, *ch.* 122. 1819, *ch.* 84, *sec.* 6. And the insolvent ought not to be divested of his property before he is finally discharged; because as the application for relief under the insolvent laws, is altogether voluntary, the petitioner may, at any time previously thereto, withdraw his application, and his former responsibility to his creditors is at once revived.

Here however, the appointment of a permanent trustee did not take place until after the death of the petitioner, and the appointment of the appellee as his administrator. By the death of the petitioner, the proceedings, upon his petition necessarily ceased.

Johnson, in reply.

The property vests in the trustee, before the final discharge of the insolvent. It precedes, and is the consideration upon which the discharge is granted. By the act of 1808, *ch.* 71, the insolvent's property vests in the trustee, immediately upon his appointment, and qualification, whether the insolvent is discharged or not.

The act of 1816, *ch.* 221, gives to the commissioners a discretion as to the time of appointing a permanent trustee, which must precede the final discharge, because it is after

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such appointment that the discharge is granted by the court, on the report of the commissioners. There is nothing in any act of Assembly which countenances the idea, that the property can be divested out of the trustee, by any act of the insolvent after his application. It is not denied, that if after the final discharge is granted, allegations should be filed within two years, and found against the insolvent, that the property would not revert to him, because it had once vested in the trustee; and as the property equally vests, before the final discharge, the consequences must be the same, if for any reason his application for the benefit of the law should be unsuccessful. The law gives authority to the trustee, under the order of the court, at any time after his appointment, to sell the insolvent's property, which necessarily involves the idea of title in him.

2. This case occurred prior to the act of 1819, and of course is to be decided exclusively, upon the previous legislation. The act of 1816, declares, that all previous laws, upon the subject of insolvency, not inconsistent with it, remain in full force, and as before the act of 1816, the County Court had authority to appoint trustees, the question is, is that authority inconsistent with the act of 1816. It is conceded, that the court is not deprived of the power, when the report of the commissioners is favorable. By the 2d section of the act of 1816, the application for the benefit of the law is made to the County Court, and the final action upon all applications is by it. That court never loses its control over these cases, from their commencement to their termination. If the construction on the other side is sound, then prior to the act of 1819, there was no authority to appoint a trustee, if the report of the commissioners should be unfavorable. The court could not, according to the argument, because of such report; and the commissioners could not, as is decided in *Glasgow vs. Sands*; and it would follow of course, that if the debtor acted fraudulently, his property could not be enjoyed by his creditors. He contended, that the report of the commissioners, whether favorable, or the reverse, re-

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mitted the case to the County Court, for its further action. If favorable, the court, under the act of 1816, is bound to discharge—if not, it exercises a discretion on the subject, that being a power (not incompatible with the act of 1816,) which belonged to the court, in virtue of the previous legislation. The 3d section of the act of 1816, gives the commissioners authority to appoint a trustee in a single case only; and the act of 1819, which confers on them the general power, does not take it from the courts. Their jurisdiction over this subject is concurrent. The commissioners certainly, by the act of 1816, have no power to remove a trustee; though that power is confided to the court by the 4th *sec.* of the act of 1805; and being a highly beneficial power, and one which it cannot be supposed the legislature intended to abolish altogether, we must conclude, as it was not given to the commissioners by the act of 1816, that it was designed to leave it with the court, under the act of 1805. If the County Court had not the power to remove and appoint a new trustee, the power did not exist in *Baltimore*.

The death of the insolvent can make no difference. The trustee was appointed immediately upon his application, in whom the property vested, for the benefit of his *then* creditors, and being so vested, his subsequent creditors cannot be supposed to have trusted him upon his faith—and should the trustee, so appointed, fail to qualify, or be removed, the subsequent appointment of another, relates back to the application.

BUCHANAN, Ch. J., delivered the opinion of the court.

After adverting to the facts before set forth, the judge said, the question is, whether the plaintiff is entitled to recover in this action of *trover*; which depends upon the construction proper to be given to the insolvent laws.

The act of 1816, for the first time, introduces into the insolvent system, a provision for the appointment of a pro-

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visional trustee by Commissioners of Insolvent Debtors, appointed for the city and county of *Baltimore*.

This provisional trustee is always to be appointed, as was done in this case, before a personal discharge is granted to the petitioning debtor. He acquires no title to the property of the insolvent by his appointment, but is a mere custodian, and takes possession of it for the benefit of the creditors; and on the report of the commissioners to the court, or a judge thereof, that he is in possession of all the property of the insolvent debtor, the court or judge grants to such debtor a personal discharge. After which it becomes the duty of the commissioners, having first given the requisite notices, and pursued the directions of the act, to appoint a trustee for the benefit of the creditors, (commonly called a permanent trustee) in whom, under the provisions of the system, all the property of the insolvent debtor in the possession of the provisional trustee, vests.

By the 5th *sec.* of the act of 1816, the commissioners are required to examine into the nature and circumstances of all such applications, and if it appears that the insolvent debtor has complied with all the terms and conditions of the insolvent laws, and has acted fairly, and *bona fide*, it is made their duty to report the same to *Baltimore County Court*, and to return the schedule, and all other proceedings had before them, to the office of the clerk of that court; upon which the judges are authorised to grant a final discharge.

It has been urged in argument, that under that act, the appointment of a permanent trustee by the commissioners, had reference to, and was in contemplation of a final discharge, and that if a petitioning debtor failed to obtain a final discharge, the whole proceedings fell to the ground, and it was as if there had been no application, and the property which had vested in the permanent trustee, reverted to the petitioning debtor.

If that were so, *Fahnestock*, the petitioning debtor in this case, having failed to obtain a final discharge, his property,

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of which the defendant had obtained and held possession, as provisional trustee, ceased to be held by him in that capacity, for the benefit of the creditors; but upon his taking out letters of administration, on the death of *Fahnestock*, he held it in the character of administrator.

But it is not considered that the appointment of a permanent trustee under that act was made with reference to, and in contemplation of a final discharge, to have effect or not, as the petitioning debtor might or might not prove to be successful in his application; but as being perfectly independent of it, being made anterior to the examination and report of the commissioners, upon which the final discharge was granted, and the policy of the law being (to prevent frauds, and in consideration of the personal discharge) to secure the property of the petitioning debtor for the benefit of the creditors, whether finally discharged or not, by causing it to vest for that purpose in the permanent trustee, and that investiture for the benefit of the creditors, in consideration of the relief from the pain of imprisonment by the personal discharge, could not be divested by the subsequent failure of the petitioning debtor to obtain a final discharge. As well may it be said, that where an insolvent debtor is convicted upon allegations filed by his creditors after a final discharge, the property remaining in the hands of the trustee reverts to him, because he is thereby deprived of all benefit of the insolvent laws, there being no difference in effect between the failing to obtain a final discharge, and the being deprived of the benefit of such discharge.

It is affirmed by this court, in *Glasgow vs. Sands*, 3 *Gill and Johns*. 96, to have been the duty of the commissioners under the act of 1816, first to appoint a provisional, and then a permanent trustee, and after having done so, to examine into the circumstances of the application, and if it should appear that the petitioning debtor had complied with the terms of the insolvent laws, and acted fairly and *bona fide*, to report, &c. to the court, whereupon the final discharge was authorised to be granted, and that is clearly the

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law ; so that, as the permanent trustee was to be appointed before any examination into the conduct of the petitioner, and when the commissioners could not have known what would be the result of their examination, or whether the petitioner would be able to show himself entitled to a favorable report, the appointment could not be considered as being made with reference to a final discharge, upon which its efficacy was to depend ; but when a petitioner obtained his personal discharge, and transferred his property, and surrendered up the possession to the provisional trustee, (who was appointed in contemplation of a permanent trustee to be nominated by the creditors,) he parted with all control over it, and ceased to have any interest in it, except so far as related to any surplus that might remain after payment of the debts ; and the provisional trustee took and held it as a custodiary for the benefit of the creditors, until the appointment and qualification of a permanent trustee, in whom it vested. When, therefore, *Fahnestock*, the petitioning debtor in this case, obtained his personal discharge, he ceased, rightfully, to have any thing to do with the property in the hands of the defendant, the provisional trustee, whose duty it was to keep and preserve it for the benefit of the creditors, until there should be an appointment and qualification of a permanent trustee ; and that custody of it was not affected, either by the failure of *Fahnestock* to obtain a final discharge, or by his subsequent death ; but the defendant continued to hold the property in his character of provisional trustee, notwithstanding he afterwards became the administrator of *Fahnestock*, the property not having vested in *Burniston and Scott*, the persons appointed by the commissioners as permanent trustees, they having neglected to give bond and security as required by law.

The only question remaining, therefore, is, whether *Glenn*, the plaintiff, was properly appointed permanent trustee, at the instance of creditors, by *Baltimore County Court*. The act of 1816 gave no exclusive authority to the commissioners, in such a case, to appoint another trustee ; and if the

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power to make such an appointment resided neither in the commissioners, nor the County Court, yet the property did not therefore revert to *Fahnestock*, but Chancery might have extended its aid to the creditors, and have appointed a trustee for their benefit, to take and make a proper disposition of the property.

But we think the *Baltimore* County Court had full power to make the appointment it did, and that *Glenn* having given bond and security as required by law, the property vested in him. The act of 1816, giving to the commissioners the power to appoint, first, a provisional, and then a permanent trustee, in relation to the city and county of *Baltimore*, operated as a repeal of so much of the act of 1805, *ch.* 110, as gave to the *Baltimore* County Court the power, in the first instance, to appoint a trustee. But the act of 1816, not giving to the commissioners, on the refusal to act, the death, or neglect, of the permanent trustee appointed by them to give bond, the power to appoint another, or the power to remove for misbehavior such a trustee, and to appoint another in his place, it only took from the County Court the power of *appointment in the first instance*; and being a part of the same system, to be taken altogether, the appointment by the commissioners took the place of the appointment by the court, leaving the power of the court to substitute another trustee in the place of one before appointed, in either of the events enumerated, the same in relation to an original appointment by the commissioners, that it before possessed in relation to an original appointment made by the court, just as if the act of 1816 had been originally introduced into the act of 1805, as a special provision for the city and county of *Baltimore*. The judgment of the court below must, therefore, be reversed.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

Morgan vs. Morgan, administrator d. b. n. of Boothe.—1832.

**RAPHAEL MORGAN vs. MORGAN, Administrator d. b. n. of
BOOTHE.—December, 1832.**

Where the defendant, in an action at law, gave a bond reciting his intention to obtain an injunction to stay further proceedings, and conditioned to perform such order or decree as the *Court of Chancery* should pass in the premises, &c. if afterwards, he in fact obtains an injunction from a *County Court*, sitting as a Court of Equity, a failure to perform the decrees or orders of the County Court, will not give the other party a right of action upon such bond, although it was approved by the judge of the County Court who granted the injunction, and filed in the injunction cause.

In assigning a breach of the condition of such a bond, it is error to aver a failure to prosecute the injunction with effect, upon the equity side of the County Court. This defect may be taken advantage of upon general demurrer.

In an action upon a bond, containing several stipulations in its condition, if the defendant relies upon the plea of performance, that plea should disclose either generally, or specially, that he has complied with all the stipulations of the condition which may be required of him, as the condition is for his benefit.

Upon general demurrer to a replication, the court will examine if the defendant's plea be valid, and if that be defective, and the first error in the pleadings, give judgment against him.

When the court believe the plaintiff can recover nothing, they will not award a *procedendo*, though they reverse the judgment of the County Court rendered in favor of the defendant.

APPEAL from Saint Marys County Court.

This was an action of *Debt* instituted on the 30th of June, 1828, by the appellant, against the administrator of *Boothe*, who dying whilst the cause was depending, the present appellee appeared, and became a party.

The suit was commenced on an injunction bond, (in which the intestate of the appellee, and one *Walker*, were principals,) dated on the 6th day of January, 1823, in the penalty of \$2,000, with the following recital and condition:

“Whereas the above bound *James Walker* and *Jeremiah Boothe*, are about to obtain an injunction to stay proceedings at law, on a judgment rendered against them in *Saint Marys County Court*, by the above named *Raphael Morgan* for, &c. Now the condition of this obligation is such,

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that if the said *James Walker* and *Jeremiah Boothe* shall prosecute the said writ of injunction with effect, and satisfy and pay, as well the said sum of money with costs, as all costs, damages, and charges that shall accrue in the Chancery Court, or be occasioned by the delay of execution on the said judgment, unless the Court of Chancery shall decree to the contrary, and shall, in all things, obey such order and decree as the Chancery Court shall make in the premises, then the above obligation to be of none effect, else of full force and virtue."

This bond was approved by one of the judges of *Saint Marys* County Court, and certified by the clerk of that court to be a true copy from the original in his office.

To the plaintiff's declaration on the above bond, the defendant pleaded that the said *James Walker* and *Jeremiah Boothe*, in the condition of the writing obligatory mentioned, their executors and administrators have, in all things, well and truly stood to, abided by, obeyed, and performed the order and final decree of the Chancery Court, made in the cause mentioned in the condition of the writing obligatory aforesaid, to wit, at the county aforesaid, according to the form and effect of the same condition, &c.

The replication, after setting out the judgment, to stay proceedings on which the injunction was obtained, stated that it was so proceeded between the said parties, on the bill in Chancery, mentioned in the condition of the said writing obligatory, and filed by the said *James* and *Jeremiah*, in *Saint Marys* County Court, as a court of equity, against him the said *Raphael*, which the said court, the said *Raphael* avers, is one and the same court as that mentioned in the condition of the writing obligatory aforesaid, by the name and style of the Court of Chancery, and not other or different court; that, afterwards, at a County Court, sitting as a court of equity, begun and held, &c. on, &c., it was by the said court of equity then and there ordered and decreed, that the injunction issued in the said cause, to stay the execution of the judgment aforesaid, be discontinued

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and dissolved, and afterwards, at the said court of equity, held, &c., on, &c., the said *James* and *Jeremiah* struck off and discontinued their said suit against the said *Raphael*, as by the record thereof in said court remaining appears, &c.

The defendant *demurred* generally to the replication, and the plaintiff joined in demurrer.

The County Court ruled the demurrer good, and gave judgment for the defendant, and the plaintiff appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, and ARCHER, J.

Brewer, for the appellant.

The bond upon which the present action is founded, was not taken under the act of 1723, *ch. 8, sec. 5*, because, although the condition is the same, a bond under that act must be approved by *the court*, not by a *single judge* in the recess. It was approved in virtue of the act of 1814, *ch. 94, sec. 2*, giving to *each* of the judges, power to grant writs of injunction in the *same manner*, &c. as the chancellor of the State can or may exercise. By the act of 1793, *ch. 30, sec. 14*, the chancellor has the power to prescribe the penalty, and approve the bond before the injunction is granted. The judge has, of course, the same power when he grants the injunction, and having approved the bond, and granted an injunction on the security of that bond, can the words "Chancery Court" be construed to mean other than his court exercising "Chancery powers?" If these words *must*, in general, be construed to mean the *High Court of Chancery* mentioned in the act of 1715, title *section 7*, and in the title of the act of 1785, *ch. 72*, and in many other acts, and the Court of Chancery of the State of *Maryland*, in the act of 1817, they ought, as it was certainly intended here, to have a meaning qualified and regulated by the jurisdiction, where the suit, the subject matter of the recital of the bond was to be entertained, and, as *is admitted by the pleadings* in this cause, was entertained. To give,

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then, the construction contended for by the appellee, would enable him to perpetrate a fraud, or lose the appellant his just demand, by the mistake of the appellee or the judge who approved the bond. Either of these, this court would be solicitous to prevent, if it could be done without giving a very forced construction to the words. The construction contended for by the appellant, is not a forced one. *Chancery*, in common parlance, means *equity*, though *Lord Coke's* definition would not give it that meaning. Thus, when one says, "I will go into Chancery," he would be understood, "I will institute proceedings in equity." In the act of 1779, *ch. 25*, fees are allowed in "Chancery proceedings in County Courts," considering them *pro hac vice*, Courts of Chancery.

The act of 1814, *ch. 94*, speaks of Chancery proceedings in the County Court. In both these laws, "*Chancery* is used as synonymous with *equity*." The county courts, therefore, acting as Courts of Equity, are acting as Courts of *Chancery*, and the definite pronoun "the" in the condition of the bond, "the Chancery Court," applies not to the high Court of Chancery, but to "the Chancery Court," in which the injunction mentioned in the recital, was about to be obtained. 2. But if the replication should be considered defective, so also is the plea, and upon demurrer the court goes up to the *first* fault.

The plea avers a performance on the part of the defendant, of the order or decree of the Chancery Court, and not a performance of the condition of the bond. If, therefore, the replication is bad, still the record must be sent back, and the plaintiff will then be entitled to a judgment by default, and to such damages as he can show he has sustained on an inquiry.

V. H. Dorsey, for the appellee.

In this case, the plaintiff's right to recover is resisted by the general demurrer on the part of the defendant. It is contended, that the breach in the replication is not in conformity with the condition of the bond sued on. The con-

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dition of the bond is to prosecute the injunction with effect in the Court of Chancery. The breach assigned is, that the injunction was not prosecuted with effect in *Saint Marys* County Court as a court of equity, and that is the Court of Chancery alluded to in the bond. *Saint Marys* County Court exercising equity powers, is not a Court of Chancery. The courts of the State can only be known to this court, by the name given to them by the act which erected them. The Court of Chancery is known to the law as *the Court of Chancery*. The first statute recognizing a bond of Chancery passed in April, 1715. The Court of Chancery was the only court known to the law that exercised equity powers, until the year 1792, when the Legislature passed an act giving the county courts equity powers in certain cases. The act of 1729, *ch.* 3, speaks of the high Court of Chancery as *the Court of Chancery*. *Vide* act 1773, *ch.* 7. So the act of 1785, *ch.* 72. And so in all the acts. The county courts exercising equity powers, are not known to the law as Chancery Courts. The first statute giving to the county courts equity powers, was passed in 1791. *Vide ch.* 78. That act was entitled “An act respecting equity jurisdiction of the county courts. By that act, an appeal is given from the county courts to the Chancery Court. By the act of 1723, power was given to the county courts to grant injunctions. The bond prescribed is like the present one. The distinction is recognized by the acts from 1798, to 1819. So by the act of 1814, *ch.* 94, entitled an act respecting the equity jurisdiction of the county courts. The act of 1815, *ch.* 163, and the act of 1816, *ch.* 134, preserves the distinction. So the act of 1817, *ch.* 154, and the act of 1819, *ch.* 193, entitled an act to enlarge the powers of the Court of Chancery, and the county courts as courts of equity. In the last act the county courts are called courts of equity; *Vide*, the various sections beginning at section seven. So by the act of 1821, *ch.* 183. These statutes plainly show that the Court of Chancery, and the county courts exercising equity powers are dis-

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tinct courts, with *different* and *distinct* names. The distinction is carried out in all of the subsequent statutes, *vide*, act of 1825, *ch.* 122, the act of 1826, *ch.* 159. By the act of 1831, *ch.* 307, and by the act of 1831, *ch.* 311, they are called courts of equity. By them the county courts exercising equity powers, are not Courts of Chancery. The breach in the replication is defective. The condition of the bond is to prosecute the injunction with effect in the Court of Chancery. The failure to prosecute a suit with effect in *Saint Marys* County Court as a court of equity is not a breach of the bond. The condition of the bond is different from the breach alleged. But admitting that the county courts are Courts of Chancery, yet the Chancery Court, mentioned in the bond, is the high Court of Chancery. Without any words to explain or designate the Court of Chancery, that court must be known to this court only as it is known to the law. The averment cannot change the nature or character of the condition. The obligation of the bond cannot be extended or varied. But it is said that the plea of performance is defective. The condition of the bond is that *Boothe* and others shall prosecute with effect, &c. and abide by such order and decree as the Court of Chancery shall make. The plea avers a performance of the said bond, that *Boothe* and others, did well and truly perform the order and decree of the Court of Chancery according to the condition of the bond. But if the plea is defective, and the court should be of opinion, that the facts as stated in the replication, will not support an action on the bond, the court will not remand the case. *The Baltimore and Havre de Grace Turnpike Company vs. Barnes, 6 Harr. and Johns.* 61.

EARLE, J., delivered the opinion of the court.

A general demurrer was put in to the replication in this case, and by the court below was ruled good. The suit being upon an injunction bond, the plaintiff set out his claim in the replication, and charged among other things,

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as a breach of the bond sued on, a failure to prosecute the injunction with effect, on the equity side of *Saint Marys* County Court, when in truth the principal obligors had engaged in the condition, to prosecute their writ of injunction with effect in the Court of Chancery. This was clearly a breach not within the contract the plaintiff had declared on, and was palpably erroneous; and there is no doubt of the correctness of the court's decision, if there is not a substantial fault committed by the defendant in an earlier stage of the pleadings. This was asserted, and insisted on by the appellant before us, and our attention was directed to the plea as being equally defective with the replication.

The plea purports to be a plea of performance, by the principal obligors, and yet it alleges a fulfilment by them of but one of the several stipulations in the condition of the bond, and leaves the rest unnoticed. Its assertion is, that the principal obligors have in all things, well and truly stood to, abided by, obeyed, and performed the order and final decree of the Chancery Court made in the case mentioned in the condition of the writing obligatory, according to the form and effect of the same condition.

The injunction bond is a penal bond, and the condition is for the benefit of the obligors, and if all is not performed that is undertaken to be done, it appears to us, the bond is forfeited, and they become liable to the penalty, and therefore it is necessary to plead a compliance with all its stipulations. This is usually done in such cases, in a plea of general or special performance, neither of which this plea can be called. It pleads a part observance only of the covenants of the obligors, and leaves it to conjecture and surmise, whether the other covenants of the condition have been performed or not. We reverse the judgment of the County Court, and as we believe the plaintiff can recover nothing on this bond, we decline sending it back on a *procedendo*.

JUDGMENT REVERSED.

Jones vs. Hungerford.—1832.

EDWARD JONES vs. WM. E. HUNGERFORD.—*December, 1832.*

Under the act of 1809, *ch.* 138, a party may be indicted for wilfully burning a school house not parcel of a dwelling house. Such property is embraced by the terms, "any other out house not parcel of a dwelling house," used in that act.

Maliciously to charge another with wilfully burning a school house, the property of another, is *per se* actionable.

But when a plaintiff alleged in his declaration, that the defendant maliciously said of him, "he burnt the school house," *inuendo*, "the school house of the defendant," or "you burnt the school house," or the plaintiff by name "burnt the school house," with the same *inuendo*, this was held insufficient upon a motion in arrest of judgment. These words do not *per se*, necessarily convey the meaning that the plaintiff had wilfully burned the house.

Where words are not *per se* actionable, and there is not a proper *colloquium* stated, nor an *inuendo*, that the defendant meant by the words spoken, to impute to the plaintiff a crime, nor any special damage alleged, the action cannot be sustained.

The report of the case of *House vs. House*, 5 *Harr. and Johns.*, 125, explained.

APPEAL from Calvert County Court.

This was an action of *Slander*, commenced by the appellee, against the appellant, on the 15th of April, 1828.

The declaration charged, that the defendant did, on, &c. at, &c. in a certain discourse, with divers good and worthy citizens of this state, of, and concerning the plaintiff, and a certain school house the property of the defendant; the said defendant, then and there, falsely and maliciously said these false and malicious words of the plaintiff, that is to say, he (meaning the said plaintiff,) burnt the school house, (meaning the said plaintiff burnt the school house so as aforesaid stated.) And afterwards on, &c. at, &c. the said defendant, maliciously intending to injure the plaintiff, in his good name, &c. and to subject him to the pains, &c. by the laws and statutes of this State, made and provided against all those, who wilfully set fire to any "mill, distillery, manufactory, barn, or other out house," did, on, &c. at, &c. in a certain other discourse which the defendant had, with

other citizens of this state, of and concerning the plaintiff, and a certain school house, the property of the defendant, then and there falsely and maliciously said, &c. these malicious words of the plaintiff, that is to say, "you" (meaning the said plaintiff,) burnt the school house. And afterwards, to wit, on, &c. at, &c. the said defendant contriving, &c. to injure the plaintiff, &c. and to subject him to the pains and penalties by the laws and statutes of this state, made and provided against those who wilfully set fire to any "Mill," &c. did, on, &c. at, &c. in a certain other discourse, which the defendant had with other citizens, of and concerning the plaintiff, and a certain school house, the property of the defendant; the said defendant, then and there, falsely, &c. said these false and malicious words, &c. of the plaintiff, that is to say, "*William Hungerford*" (meaning the plaintiff,) burnt the school house, (meaning that the said *Wm. Hungerford* burnt the school house, so as aforesaid stated,) by means, &c. of which the defendant is greatly hurt, &c.

Issue was joined upon the plea of not guilty, and there was a verdict for the plaintiff.

A motion in arrest of judgment was then made by the defendant, and the following reasons assigned.

1. Because the words in the plaintiff's declaration alleged to have been spoken by the defendant, are not actionable *per se*, connected with the *colloquium* in the said declaration stated.

2. Because the said words *per se*, as connected as aforesaid with the said *colloquium*, are not actionable, and the plaintiff has not alleged, nor stated, any special damage.

3. Because the burning of a school house, not a public school house, is not punishable as a criminal offence, at common law, nor by virtue of any act of assembly in force in this state.

4. Because the plaintiff has not alleged in his declaration that the said school house was an out house at the time the said burning is supposed to have been charged, or a dwelling house, or that the same was empty at the time, or

that it contained any tobacco, rye, wheat, oats, indian corn, barley, flax, hemp, hay, or other country produce, horse or horses, cattle, or goods, wares and merchandize, nor that the same was a public school house.

5. Because a school house, is not an out house, within the meaning of the act of 1809, *ch.* 138, or any act, or statute, in force in this State.

The motion in arrest was overruled by the County Court, and judgment rendered on the verdict for the plaintiff.

From this judgment, the defendant, appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, ARCHER, and DORSEY, J.

After the cause was put under rule argument, the death of the appellant was suggested.

Brewer and Stonestreet, for the appellant.

1. The burning a school house is not a felony, or criminally punishable at common law, unless it be parcel of a mansion house. 2. The burning a school house, *belonging to an individual*, is not a felony, or punishable by the act of 1809. 3. The burning a school house, belonging to an individual, is not a felony, and punishable by the act of 1809, unless it be alleged to be an out house. 4. The allegations "you burnt the school house"—"*William Hungerford* burnt the school house," are not actionable, it not being alleged, that the defendant said, that he burnt it wilfully, and maliciously, or that such was the meaning of the defendant. *Russel on Crimes*, 1567, 1661. Act of 1809, *ch.* 138, *sec.* 5. 4 *Jacobs' Law Dic.* 464.

V. H. Dorsey and *R. W. Gill*, for the appellee.

Does the declaration contain words imputing an indictable offence? It directly charges the plaintiff with having burnt a school house, the property of the defendant. The act of 1809, *ch.* 138, declares it criminal to burn a variety

of buildings, enumerating them specially, and concludes with these general words, "or any other out house not parcel of a dwelling house." To burn any such out house is criminal. It was criminal at common law to burn any dwelling house, which includes all buildings parcel of the mansion house. The legislature intended to include all other buildings. It results from the common law, then, and the act of assembly, that to burn any building is indictable. The common law was designed to protect the habitations of men, the act of assembly to protect his property. Since the case of *House vs. House*, 5 *Harr. and Johns*. 125, it is immaterial whether the house destroyed is empty, or contains personal property. To burn a barn, whether full of property, or empty, is indictable. To burn any other house, must upon the same principle be indictable. One empty house, is as much the object of the law's protection as another. A colloquium is then unnecessary. The words, not parcel of a dwelling house, can make no difference. The school house is parcel of a dwelling house, or it is not, and in either case, to burn it is indictable. A slanderous and actionable charge is made, when the defendant, in substance, imputes to the plaintiff the *corpus* of an indictable offence. He need not change all the circumstances necessary to identify the crime—to say "you are a thief," or "you have committed arson," and the like, is sufficient.

BUCHANAN, Ch. J., delivered the opinion of the court.

This is an action of *slander*, and the words charged in the first count in the declaration are, "he burnt the school house," *inuendo*, the school house of the appellant *Edward Jones*.

In the second count, "you burnt the school house," and in the third count, "*William Hungerford* burnt the school house," with the same *inuendo*, in each, as in the first count. To which there was a plea of not guilty, and issue, and a verdict for the plaintiff, the appellee, and a motion in arrest of judgment, which was overruled, and judg-

ment entered upon the verdict for the plaintiff. And the question presented to us, is, whether the words as charged in the declaration, are actionable *per se*.

By the 5th section of the act of 1809, *ch.* 138, it is provided, that “every person, his, or her, aiders, abettors, or counsellors, who shall be duly convicted of the crime of wilfully burning any mill, distillery, manufactory, barn, meat house, tobacco house, stable, ware house, or other out house not parcel of any dwelling house, being empty, or having therein any tobacco, wheat, rye, oats, indian corn, barley, flax, hemp, hay, or other country produce, horse, or horses, cattle, or goods, wares, and merchandize, shall, at the discretion of the court, suffer death, by hanging by the neck, or be sentenced to undergo a confinement in the penitentiary house, for a time, not less than three, nor more than twelve years.” There can, we think, be no doubt that a school house, not parcel of a dwelling house, is embraced by the terms, “any other out house, not parcel of any dwelling house,” and that maliciously to charge another with wilfully burning a school house, (the property of another,) is *per se* actionable. But as it is not every burning that constitutes an offence, and a man may innocently, and without committing any offence punishable by the law, burn any house, the intention always entering into the essence of the offence; and the *wilfully* burning any of the houses mentioned in the act of assembly, being the offence described, and provided against, it is not sufficient, in an action of slander, merely to charge in the declaration, that the defendant said of the plaintiff, “that he had burned such a house,” such words, not naturally, and *per se*, conveying the meaning that he had *wilfully* burned the house, or committed the offence prohibited by the act of assembly; but might have been intended of an innocent, and not a felonious burning. And it is not like the case of words spoken, that are *prima facie* actionable, as the directly calling a man a *thief*, or saying of him that he was guilty of perjury. In relation to which, it is sufficient to state in the declaration,

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the malicious intent of the defendant, and the slanderous words spoken concerning the plaintiff. Here the declaration does not state a slander *prima facie* actionable, as the saying of the plaintiff, that he had *wilfully burned the school house*; and there is neither a proper *colloquium* stated, nor an *inuendo*, that the defendant meant, by the words spoken, to impute to the plaintiff the crime of wilfully burning the school house. In *House vs. House*, 5 *Harr. and Johns.*, 125, cited in the argument by the counsel for the plaintiff, it will be seen, on examination of the record, that there was an *inuendo*, that the defendant meant that the plaintiff was guilty of *arson*, and did *wilfully* burn the defendant's barn.

JUDGMENT REVERSED.

STATE use of the PRESIDENT AND TRUSTEES OF CHARLOTTE HALL SCHOOL vs. PHILIP GREENWELL.—*December, 1832.*

In an action upon an administration bond, brought for the use of the President and Trustees of Charlotte Hall School, claiming the residue of an intestate's estate, for default of kin within the fifth degree of either consanguinity or affinity, under the acts of 1719, *ch. 14*, and 1729, *ch. 24*, the defendant pleaded in bar, that the intestate left a certain B within the fifth degree of consanguinity, who was entitled to the residue, &c.; upon this plea issue was joined. HELD, That B could not be called to prove, that she was related to the deceased, within the fifth degree, as she had a direct interest in establishing that fact.

Where a recovery is had against a trustee in a court of competent jurisdiction, where he has been guilty of no fraud or collusion, but acted *bona fide* in resisting claims against him, he is not answerable over to another, though not a party to the suit, for the same sum adjudged against him.

The administrator being a trustee for the witness, the judgment in this case would be an absolute bar to any suit instituted by the witness to recover her distributive share.

Where the *cestui que trust* has notice that a fund in the hands of his trustee is sued for by a third person, he may participate in the defence of the action, and is barred by a judgment adverse to his interests.

The declarations of a deceased party are competent evidence, in an action against his administrator for the residue of his estate, to prove that a particular person was his relation, and the degree of the consanguinity or affinity between them; but a conversation between the deceased and another, in which each reckoned up their descents, when the deceased remarked, if that be the case, we are second cousins, is not admissible evidence for the purpose aforesaid.

The mode of ascertaining the degree of kindred between two individuals, according to the act of 1798, *ch. 101, sub-ch. 11, sec. 15*, is to reckon by counting down from the common ancestor to the more remote. This applies to all cases of distribution of personal estate.

Upon a motion in arrest of judgment, no reasons need be assigned. That motion serves in some measure, the office of a demurrer, and brings the whole record to the view of the court.

The act of 1825, *ch. 117*, does not apply either to demurrers or motions in arrest of judgment.

In an action brought in the name of the State, for the use of a person entitled to a fund, it is no valid objection to the judgment, that costs have been adjudged against the State.

That is the proper mode of entering the judgment since the act of 1794, *ch. 54, sec. 10*, and its effect is to render the equitable plaintiff liable to an attachment for costs, if he fails to sustain his action.

Upon a successful motion in arrest of judgment, each party pays his own costs.

The State is not liable for costs unless there exists some legislation to make her so, and no execution should be awarded against her.

Under the act of 1729, *ch. 24, sec. 17*, administrators in certain cases are directed to pay, and satisfy the balance of the estate of those intestate persons who leave no legal representatives, &c. "to the visitors of the public school of the county where the deceased resided." The replication in assigning a breach under that act, alleged, that the intestate "K, died possessed of a large personal estate in *Saint Marys* county." HELD, That although this allegation was ambiguous, yet it was sufficient upon a motion in arrest of judgment.

The charter of the visitors and trustees of the Charlotte Hall School, (act of 1774, *ch. 14*,) is to be considered in the light of a public law. Its visitors are liable to a penalty if they refuse or delay the acceptance of their appointment, and the charter is referred to specially in several public laws connected with the fiscal operations of the government. In alleging its right to sue, it is not necessary to refer to the various acts of assembly which relate to it.

When a defendant takes a bill of exception and afterwards succeeds in a motion in arrest of judgment, he has no ground of appeal; yet if the plaintiff appeals, and the court reverses the decision upon the motion, if it is perceived that the County Court has erred upon the bill of exceptions, a pro-

cedendo will be awarded, and when the County Court enters a final judgment, the defendant will be entitled to his appeal.

CROSS APPEALS from *Saint Marys* County Court.

This was an action of *Debt*, instituted on the 20th January, 1826, in the name of the *State*, for the use of the *President and Trustees of the Charlotte Hall School*, on the bond of *Greenwell*, as administrator of one *Marcus Killion*, dated 9th September, 1818, in the penalty of £5000.

To the plea of general performance the plaintiff replied, That by a certain act of assembly, made and passed at &c. (1719,) entitled, “an act for the application of such intestates’ estates, as leave no legal representatives, and for enforcing proceedings against *temerary* administrators,” after reciting among other things, whereas it frequently happens, that persons who are possessed of considerable personal estate, die intestate, leaving no known relations or representatives, legally entitled to the residue thereof; in which cases ’tis observed, some creditor, or pretended creditor of such deceased, most commonly obtains the administration of his goods and chattels, and thereby becomes legally possessed thereof; by virtue whereof, he not only satisfies himself, but all other creditors their just claims, but likewise retains in his hands the total residue of such estate, and converts the same to his own use, on pretence of securing himself against such latent debts, as may thereafter appear, whereby such administrator has the sole benefit of such goods and chattels, as he had no other pretence of right to, save for the satisfying himself a debt, and perhaps but a small one, out of the deceased’s estate. For the more just and better application of which residues for the future, it was among other things enacted, that every such administrator as aforementioned, shall be obliged to pay and satisfy the balance of such estates to one of the public treasurers of this province, now State, for the time being, in the same manner as such administrator should have been by law obliged to pay the same to any legal residuary legatee, in case any such should have appeared, to be applied to the

use of schools, in the same manner as the additional duty of twenty shillings per poll on *Irish* servants, and negroes, is directed; save, that whereas, that by the act for the better administration of justice in testamentary affairs, &c. sundry particulars of goods and chattels are directed to be paid in specie, according to the appraisement, to the residuary legatees; in this case, such administrator shall be obliged to pay the said balance of such estate, according to the true value thereof, in current money, for the payment whereof he shall be allowed twenty per cent., that is to say, ten per cent. over and above the ten per cent. usually allowed, provided, that in case such administrator be of kin to the deceased, within the fifth degree of either consanguinity or affinity, that then such administrator, and all others, that are nearly related to the deceased, as such administrator, shall have as good a right to such residue, as if he or they were brothers or sisters' children to the deceased, and such balance shall be distributed accordingly, as by the said act still in force and unrepealed, more fully appears. And the said State also says, that by an act of assembly entitled, "an additional and supplementary act to the several acts for the administration of justice in testamentary affairs," passed at, &c. (1729,) it was among other things enacted, that every administrator obliged by the act, entitled an act for the application of such intestates' estates as leave no legal representatives, &c. to pay the balance of the estate to one of the public treasurers, shall hereafter be obliged to pay and satisfy the balance of such estate to the visitors of the public schools of the county where the deceased resided, in the same manner as such administrator should have been obliged by law, to pay the same to any legal representative, in case any should have appeared; to be applied to the use of such school, save, that by the acts now in force, sundry particulars of the goods and chattels are directed to be paid in specie, according to the appraisement, to the legal representatives; in this case such administrator shall pay the balance of such estate in current money, or in specie,

at the direction of the visitors, for the payment whereof, if in current money, he shall be allowed ten per cent., if in specie five per cent., and no more; provided, that in case such administrator be of kin to the deceased, within the fifth degree of either consanguinity or affinity, then such administrator, and all others that are as nearly related to the deceased as such administrator, shall have as good a right to such residue, as if he, or they, were brothers or sisters' children to the deceased; and such balance shall be distributed accordingly, as by the said act still in force and unrepealed, more fully appears. And the said State in fact says, that the said *Marcus Killion*, deceased, in the condition of the said writing obligatory mentioned, died possessed of a large personal estate in *Saint Marys* county aforesaid, leaving no relations, or representatives, or relation, or representative, entitled by law, or either of the aforesaid acts of assembly, to the balance or residue of the estate of him the said *Marcus Killion*, in the hands of him the said *Philip*, after paying the debts of the deceased, and that the said *Philip* was, by *Saint Marys* county Orphans Court, appointed administrator of the said *Marcus Killion*, on, &c. and by virtue of the administration, on the estate of the said *Marcus Killion* deceased, possessed himself of the goods and chattels, rights and credits of the said deceased, to a large amount, to wit, to the value of \$1604 81½, current money, at, &c. and that after paying and satisfying the debts of said deceased, there remains a balance or residue of \$1604 81½, current money, payable to the *President and Trustees of the Charlotte Hall School*, which said balance the said State says, the said *Philip* has not paid to the said *President and Trustees of the Charlotte Hall School*, as the law will charge, and he ought to have done, but that the said *Philip* has misapplied the same, contrary, &c.

The defendant rejoined, that the intestate left a certain *Bridget Quigley* within the fifth degree of consanguinity, and as such, entitled to the residue of the estate of the intestate, in the hands of the defendant as administrator, &c.

To this rejoinder the plaintiff took issue.

1. At the trial of the cause the defendant, in support of the issue on his part joined, offered to give evidence by *Bridget Quigley*, in the said rejoinder mentioned, that she was within the fifth degree of consanguinity to the said *Mark Killion*, in the condition of the said bond mentioned; to the competency of the said *Bridget Quigley*, to prove the said fact, the plaintiff, by its counsel objected, and the court, (KEY, and PLATER, A. J.,) sustained the objection, and refused to permit the said witness to give such testimony.

The defendant excepted.

2. The defendant then offered to prove by *Bridget Quigley*, the same person mentioned in the pleadings, that she was the second cousin of the said *Mark Killion*. To the competency and admissibility of which witness, to give testimony, the plaintiff by his counsel objected. The court sustained the said objection, and the defendant excepted.

3. The defendant further offered to give testimony, by a legal and competent witness, that he knew *Mark Killion*; that he was present when the said *Mark Killion* and *Bridget Quigley* each reckoned up their descents; *Mark Killion* first tracing his descent, and then the said *Bridget Quigley* reckoned up hers; upon which the said *Killion* remarked, if that be the case, we are second cousins; and further, that at the time of this conversation, he did not recollect that either, *Killion* or *Mrs. Quigley*, stated that they knew each other in *Ireland*; nor does he recollect that they stated, that they did not know each other before they came to this country; and this witness further stated, that at a subsequent conversation, at a different time and place, he heard the said *Killion* say, that *Bridget Quigley* was his second cousin, in answer to a person who recommended said *Killion* to marry said *Bridget Quigley*; the said witness further states, that he never heard the said *Mark Killion* say, that he knew the father, mother, or any of the ancestors of *Bridget Quigley*, to which testimony the plaintiff by his

counsel objected. The court sustained the objection, and the defendant excepted.

The verdict being for the plaintiff, the defendant moved in arrest of judgment, without assigning any special cause. The court sustained the motion, and gave judgment against the State, for the defendant's costs, and awarded an execution for the same, &c.

An appeal was thereupon prayed by both parties.

The cause came on to be argued before BUCHANAN, Ch. J., and EARLE, MARTIN, and ARCHER, J.

Alexander, for the appellant, contended.

1. That the defendant was not entitled to a judgment for costs upon his motion in arrest, though the motion was decided in his favor. 1 *Harr. Dig.* 354. Nor, although the judgment was arrested, should the verdict have been set aside. 2 *Evans' Harr.* 324. 2 *Saund.* 243. And the awarding an execution against the State for the costs, was also erroneous. 2. The pleadings were regular, and judgment on the verdict should have been rendered for the plaintiff. In support of the plaintiff's case, as exhibited by the replication, he referred to the act of 1719, *ch.* 14, *sec.* 2. 1729, *ch.* 24, *sec.* 17. 1802, *ch.* 101, *sec.* 11. 1798, *ch.* 101, *subch.* 11, *sec.* 15. 1723, *ch.* 19. 1753, *ch.* 19. 1758, *ch.* 13. 1774, *ch.* 14. And he insisted, that the acts above referred to, are public acts, of which, the court is bound to take notice, and consequently, they need not be stated in the pleadings. *Towson vs. Havre de Grace Bank*, 6 *Harr. and Johns.* 52. 3. *Bridget Quigley* was incompetent, as a witness, being interested in the event of the suit. 2 *Stark. Ev.* 770, 785. *West vs. Randall*, 2 *Mason Rep.* 181. 4. Nor were the declarations of the deceased admissible, being nothing more than hearsay, and not of that character which would make them evidence, even as to matters of pedigree. *Thorne vs. Lord*, 2 *Wm. Black.* 1099. 1 *Phil. Ev.* 188. *Berkely Peerage case*, 4 *Camb.* 404. *Jackson vs. Browner*,

18 *Johs. Rep.* 89. 2 *Com. Rep.* 347. In the admission of hearsay evidence, in cases of pedigree, the court exercises a sound discretion. *Davis vs. Davis*, 7 *Har. and Johns.* 36, 95, 357, 507. *Owings vs. Norwood*, 2 *Harr. and Johns.* 101. *Hall vs. Gittings*, 2 *Harr. Johns.* 393.

No counsel argued for *Greenwell*.

ARCHER, Ch. J., delivered the opinion of the court.

These are cases of cross appeals from *Saint Marys* County Court; the plaintiffs appealing from the judgment of the County Court on the motion in arrest of judgment. And the defendant objecting to the opinion of the County Court expressed in three bills of exception taken at the trial.

We shall consider these cases as consolidated for the purposes of this opinion, and shall express our views, first, upon the various questions of evidence, and secondly, upon the questions arising under the motion in arrest of judgment, and as to the judgment itself.

The claim of the plaintiff rests solely on the fact, according to the issue, whether the person referred to in the pleadings, was related to the intestate within the fifth degree of consanguinity. The defendant could alone succeed by establishing that *B. Quigley*, the witness, was entitled to the very fund in controversy, by showing her relationship to the intestate. Now if the evidence offered were true, and to test its admissibility we must concede it to be true, then a witness is offered by the defendant, who is in possession of the fund, to prove that the witness herself is entitled to the whole fund in controversy; this we conceive cannot be done. She has a direct and immediate interest in establishing the fact she is called upon to prove. The defendant is the trustee for whomsoever may be entitled to the funds in his hands, and there certainly must exist a privity between the trustee and the *cestui que trusts*, and where a recovery is had against a trustee in a court of competent jurisdiction, where he has been guilty of no fraud,

or collusion, but has acted *bona fide*, in resisting claims against him, it is impossible that he could be answerable over to another, though not a party to the suit for the same sum adjudged against him. Or in other words, that the law could twice make him answerable for the same trust fund. If this doctrine be correct, and we are inclined to think it is, although *B. Quigley*, the witness, was not party to this suit, yet if all the funds in the administrator's hands were swept from him, by a judgment in this case, such judgment would be an absolute bar to any suit instituted afterwards by her against the administrator, to recover her distributive share. The effect of her evidence is, then, to enable the administrator to hold the funds for her benefit; for her evidence shows, that she is entitled to it, and to prevent its recovery against him, when if it was recovered it would be lost to her. In this view of the case, she had a direct interest in the event. But if we were incorrect in this, it is clear that the judgment against the administrator would be a bar against any claim made by the witness, where no fraud or collusion existed, and where she had notice of the controversy, that she might participate in its defence. Here she had notice, and therefore was clearly, properly excluded. The court were therefore right in rejecting the evidence offered on the part of the defendant, in the first and second bill of exceptions.

But we are of opinion, that so much of the evidence in the third bill of exceptions, as relates to the declarations of the intestate, that he, and *B. Quigley* were second cousins, was admissible testimony. It is evidence to prove a relationship within the fifth degree; if it be reckoned by counting down from the common ancestor, to the more remote, according to the rule prescribed by the act of 1798, *ch. 101, sub-ch. 11, sec. 15*, and that mode must be adopted, whatever was the rule anterior to the passage of that act. The reservation in the 15th section refers alone to the surplus, after making the computation of relationship as required by it, and was not intended to preserve a different mode of

computing relationship, where the schools were to have the surplus, from that prescribed, where the estate was to be entitled to it.

The admissibility of the intestate's declarations depend upon the same principles, as do all declarations in relation to pedigree. The conversation with *B. Quigley*, anterior to these declarations, may lessen its weight with the jury, but it comes from an unquestionable source. It is a very fair presumption, that there exists with every man, particular, actual, or traditionary knowledge, in reference to his own relations, and there exists *prima facie*, a competence in him to speak of them. His means of knowledge may vary according to the circumstances in which he may have been placed, and it is for the jury to give credit, or not, to the declarations, as they may think under all circumstances they are entitled to. Assigning to the intestate, and her who claims to be his distributee, a reasonable age of maturity, as we are justified in doing, from the bill of exceptions, there is hardly a probability, that the facts attempted to be proven by the declarations, could be established by living testimony. Under these impressions, we think the court should have admitted the declarations, last spoken of in the third bill of exceptions by the intestate, as evidence. The conversation between the intestate and *B. Quigley*, to prove relationship, was clearly inadmissible.

The objections to the record, arise on a motion in arrest of judgment. That no reasons have been assigned, constitutes no valid objection against our examination of the record. The motion in arrest of judgment serving in some measure the office of a demurrer, we must consider that the whole record was brought to the view of the court, and that therefore, as regards the act of 1825, the motion in arrest of judgment must be governed by the same principles as a demurrer, and that in neither case, is the presentation of the particular grounds of action in the court below, a necessary preliminary to our entertaining the appeal.

Some objections have gone to the form of the judgment itself, others to the pleadings in the cause. It is no valid objection against the judgment, if costs could in such a case have been rightfully granted, that costs have been adjudged against the State. It is certainly true, that the State is not liable for costs, unless there exists some legislation to make her so; and the act of assembly of 1794, *ch. 54, sec. 10*, so far from creating any responsibility, throws it on the *cestui que use*; and renders such person liable by attachment. On a failure, however, of the plaintiff in his action, the act of assembly contemplates the entry of a judgment, and it could not be entered in any other manner than against the State, because in all the records and proceedings the State's name, and not the name of the *cestui que use*, is used as the plaintiff, and it could not be, therefore, entered against the *cestui que use*. But notwithstanding this, the only effect of the judgment is to create a liability in the *cestui que use* for the amount. In the rendition of the judgment, however, no execution should have been awarded against the State. It is also erroneous in adjudging costs against the plaintiff. In a successful motion in arrest, each party pays his own costs. The defendant is not entitled to costs. He should have taken advantage of the error in the pleadings, by demurrer, and not having done so, he has by laying by, contributed to the costs of the proceeding.

But we conceive the court were in error in arresting the judgment. We can perceive no defect, which after verdict could have availed the defendant. The title of the plaintiff is sufficiently set out in the replication. An averment that *Marcus Killion* died in *Saint Marys* county, without leaving any relation within the fifth degree of consanguinity or affinity, and that thereby the equitable plaintiff became entitled to the funds in controversy, was all that was necessary to have been done.

As regards the death of *Killion*, in *Saint Marys* county, the averment in the replication is, "*that he died possessed of a large personal estate in Saint Marys county.*" There

is certainly an ambiguity attached to this phraseology. It may mean to describe the locality of the property, or it may be understood, as designating alone, the place of the death of the intestate. Different meanings may be attached to it, according to the punctuation which may be given to it, and standing without punctuation, the sense is equivocal. Had this objection been urged on demurrer, it might have been available; it is a rule in pleading, that if the meaning of words are equivocal, they shall be taken most strongly against the pleader. 2 *H. Black.* 530. But it is not available in arrest; for after verdict an ambiguous expression in a declaration, or replication is cured, and must be construed in that sense, which would sustain the verdict, 1 *Ch. Pl.* 216. *Cowp.* 825; and the court will intend, that the residence in *Saint Marys* county, without which the plaintiff could not recover, was proved at the trial. Courts will, and ought to be cautious, how they arrest judgments after verdict. They should intend nothing to overturn them. 3 *Bur.* 1725; nor ought we to be called upon to be astute, to defeat rights, when the law makes it our duty to be solicitous to maintain them.

We have said that the averment, that the equitable plaintiff was entitled to the funds in controversy, was the only averment of right which was necessary. It could not be requisite, to set out the title of the president and trustees to the funds with particularity, by referring to the various acts of assembly which gave the right, in the pleadings; because the laws in relation to that institution, are clearly public laws. The trustees are made subject, by the third section of their charter, (1774, *ch.* 14,) to the same penalties as the visitors of the county schools, and by reference to the act for the encouragment of learning, and erecting schools in the several counties, it is provided, that every visitor duly appointed shall be liable to a penalty, if he refuse or delay his acceptance of the appointment. *Towson vs. Havre de Grace Bank*, 6 *Harr. and Johns.* It is also clearly to be considered in the light of a public law,

to be judicially noticed by the courts, having been referred to specially in a public law entitled, an act for the promotion of literature, and also referred to generally in a public law, passed in 1826, *ch.* 265, entitled, an act to enable the trustees of county, and other schools and academies, to recover and obtain possession of the funds, and other property and effects, belonging to such schools and academies. This institution has annual donations granted to it by various acts of assembly, and it may therefore be considered as connected with the fiscal operations of the government, and so a public law; and being thus required to notice the laws, in relation to this corporation as public laws, we know by the same means that it is located in *Saint Marys* county, the laws themselves referring to its locality.

The entry of the judgment below being erroneous, and the court having erred in arresting the judgment, we might proceed to pronounce a final judgment in this cause, but by doing so, we should inflict injustice upon the defendant. He would, in such an event, lose the benefit of his exceptions, and of the trial of the matters in issue before the jury; for the appeal on the part of *Greenwell*, is improperly here, and must be dismissed; the judgment below having been in his favor, there was nothing to appeal from. When however, the cause goes back to the County Court, should the plaintiff insist upon the judgment being rendered in his favor, then the defendant will be in a condition to prosecute his appeal, and upon producing the record here, will be entitled to a reversal upon the third bill of exceptions. We have presented our opinion upon these bills of exceptions, in order that a future appeal upon them might be thereby prevented, and supposing, that by the expression of our opinions upon them, the motion in arrest would be withdrawn, and that a new trial would be consented to by the parties. The appeal on the part of *Greenwell* is dismissed with costs; and the judgment in the appeal of the State use of the *President and Trustees of Charlotte Hall School* is reversed, and a *procedendo* awarded.

DANIEL CHAMBERS *vs.* PRUDENCE G. CHALMERS, *et al.*
December, 1832.

According to the established practice of Chancery in this State, it may be taken to be a general rule, that a defendant, although he answers the bill, and issue be joined thereon, may at the hearing object, that the case made in the bill does not entitle the party to equitable relief, and if his objection be sustained, the bill will be dismissed.

This rule however, as it regards some defences, at least, given by statute, cannot apply. Limitations must always be pleaded, both at law and in equity ; and a defendant cannot avail himself of limitations, merely because the proceedings of the plaintiff show a case to which limitations might be applied.

The same doctrine, though not perhaps to the same extent, prevails, where reliance is placed by a defendant upon the usurious character of the contract set out in the bill, as the foundation of the plaintiff's proceeding.

Where a bill for the specific execution of a contract states a case, which may or may not be usurious, according to the facts which really exist in the case, the statute of usury must be pleaded or relied upon in the answer, or it will not avail the defendant. The rule might be different, if the bill stated a usurious contract which no inference or intendment can help.

Where a contract contained divisible, unconnected, and independent stipulations, the performance of which was agreed to be guarantied by the execution of a mortgage, and afterwards upon a liquidation of the accounts of the parties, the mortgage was executed, it was held to be no objection in equity to enforcing the mortgage, merely because some of the stipulations in the first contract were usurious. To sustain the objection that the mortgage was usurious, it should have been stated, that it was given to secure the usurious stipulations mentioned in the contract.

After issue joined upon an answer alleging usury, generally, it cannot be objected at the hearing, that this defence had not been taken with more legal precision. This could not be done even at law.

Pleadings in Chancery should consist of averments or allegations of fact, and not of inference and argument.

Where a plaintiff claimed to have a mortgage recorded after the time allowed by law, and the defendant set up a claim to an allowance out of the property which it was alleged was a part of the consideration for uniting in the mortgage, evidence that the plaintiff had said, (after the time for recording the mortgage had elapsed,) he never blamed the defendant in the transaction, and that he was willing to allow her \$3000, out of the property in dispute, and that he had employed R to call upon the defendant and explain to her the propriety of accepting that sum, is not sufficient to support the defence.

An agreement that a co-defendant might be examined before a Justice of the Peace, to have the same effect as if taken regularly under a commission

for evidence, or a commission *de bene esse*, and as if the chancellor's order for his examination as a witness had been obtained, does not waive an objection to the witness's competency, and the exception may be taken at the hearing.

Defendants who are properly joined in equity, who have an interest in the same subject matter, and must be affected by the same evidence, are not competent witnesses for each other.

Where a married woman and her trustee united in a mortgage of her separate estate, upon a bill to enforce the mortgage, in which they were both made defendants, the trustee being responsible for costs, is not a competent witness for his co-defendant.

APPEAL from the Court of Chancery.

The present bill was filed by the appellant, against the appellee, and one *Thomas Lee*, (since deceased,) on the 24th of October, 1825. It alleged that the complainant, being seized and possessed of a rope walk, with the necessary hands and stock, &c. on or about the 1st of November, 1826, was applied to by *James Chalmers*, now deceased, to rent the rope walk and hands to him, and to sell him the stock of materials then on hand, he promising to secure complainant, by a mortgage of all his, the said *Chalmers*, property, real, personal, and mixed. That wishing to retire from business, the complainant accepted the proposal, and in pursuance thereof, a written contract was entered into, between them, containing the terms of said agreement, which contract is exhibited, and made part of the bill. That *Chalmers* at that time was seized, and possessed of a certain real and personal estate, contained in a deed of mortgage beneath exhibited, and made a part of these proceedings. That after the date of the aforesaid agreement, and in violation thereof, complainant was informed, that *Chalmers* had executed a conveyance of the property, in the said deed contained, to *Thomas Lee*, in trust for the benefit of the grantor's wife, *Prudence G. Chalmers*, (one of the appellees.) That upon this information he applied to *Chalmers* to liquidate the amount due him, and to prevail on *Thomas Lee*, the trustee, to join in a mortgage to complainant of the property, conveyed as aforesaid to *Lee*, for the benefit of

Chalmers' wife, to secure the amount which might be found to be due the complainant. That upon a liquidation of their accounts, there was found to be due from *Chalmers*, to complainant, the sum of \$4200, and accordingly, he, *Chalmers*, directed his counsel to propose a mortgage of the property, in the deed to *Lee*, to secure the same, payable in one year, with interest from the 15th August, 1810, in which, said *Lee* agreed to join. That said deed of mortgage was subsequently executed, and delivered to him, on the 31st of December, 1811, by the counsel for *Chalmers*, and complainant, supposing it had been but just then executed, and it not at that time being convenient, to carry it to the office to be recorded, put it away for a few weeks, at the expiration of which time, upon reading it, he found to his surprize, that the time for recording it had elapsed. That the omission to record said deed, was from no fraudulent design, but from the cause above mentioned. That the parties by whom it was executed having refused to give him another mortgage, he filed his petition in the Court of Chancery, to have the first deed recorded, which the chancellor decreed should be done, but that decree was reversed, upon an appeal to the court of appeals, without prejudice, in consequence of the relief which the chancellor granted, being beyond the prayer of the petition. That the conveyance by *Chalmers* to *Lee*, in trust, for the grantor's wife, was without consideration, and in fraud, and violation of his agreement with complainant. The bill then prays, that the mortgage deed may be decreed to be recorded, and that the property therein contained may be sold, for the payment of complainant's claim, &c. and for general relief.

The agreement referred to in the bill, dated 1st November, 1806, recited, "whereas the said *Daniel Chambers*, and *James Chalmers*, for the mutual satisfaction, and reciprocal benefit of each other, do enter into the following articles, as binding on each according to their true intent and meaning."

1. The said *Daniel Chambers* doth hereby agree, to put into the hands of said *James Chalmers*, stock in rope yarn, as agreed on by them, to amount of \$3000, for the entire use of said *Chalmers*, as stock in trade, during the term of two years, from the date thereof, redeemable, optionally, at any time by said *Chalmers*, within the said two years.

2. For and in consideration of the above capital stock of \$3000, the said *Chalmers* doth bind himself, his heirs, &c. to pay the said *Chambers*, quarterly, for the use of said stock, according to the dividends made on bank stock in the *Union Bank of Maryland*, provided the same sinks not lower than simple interest, then, and in such case, say simple interest.

3. The said *Chambers* doth hereby agree, to rent to him the said *Chalmers*, his rope walk, and untensils for manufacturing rope, for the term of four years, from the date hereof, together with horses, &c. for the annual rent of \$300, payable quarterly, at the expiration of which term, the said rope walk, &c. to be returned by the said *Chalmers* to the said *Chambers*.

4. This article relates to the hire of hands to be employed at the rope walk.

5. The said *Chalmers* obliges himself not to sell, or transfer the aforesaid capital stock, or mix it in co-partnership stock, or purchase property with it, without first consulting the said *Chambers*, or his agent appointed for that purpose; and further, as a guaranty for the return of the said stock of \$3000, the said *Chalmers* will make a sufficient deed of mortgage, to *Chambers*, of his property, real, personal, and mixed, until these articles are complied with, according to their true intent and meaning, of securing *Chambers*, that no loss may arise, in either, principal or interest, rents or wages, &c.

The mortgage referred to, dated 1st July, 1811, recites, that *Chalmers* did heretofore, on the 3d of January, 1809, for the consideration therein mentioned, convey to *Thomas Lee*, his heirs and assigns, parts of two tracts of land, called,

&c.; to have and to hold the same in trust, for the separate use of *Prudence G. Chalmers*, and her heirs, and to dispose of as she, or her heirs, should appoint and direct. And whereas, the said *James Chalmers*, before the date of said deed, had contracted a debt hereinafter mentioned, with the said *Daniel Chambers*, the payment whereof he had agreed to secure by mortgage, on the same parcels of land, as by a writing to that effect, signed and sealed by the said *Chalmers*, will appear. And it being of importance to said *Chalmers*, to have a further indulgence for said debt, and the said *Prudence G. Chalmers*, being willing that her husband's contracts should be carried into effect, hath appointed, and directed the said *Thomas Lee*, to dispose of, and convey the said lands, and premises, to the said *Daniel Chambers*, in mortgage, to secure the said sum of money agreeably to the terms of said agreement. In consideration of the above recited premises, and of one dollar, the said *Thomas Lee* bargained and sold, to the said *Chambers*, his heirs and assigns, the lands and premises, in the aforesaid deed of trust; with a proviso, that if the said *James*, and *Prudence G. Chalmers*, shall, on or before the first day of July next, pay the said *Daniel Chambers*, the sum of \$2200; and on the first of July, 1813, the further sum of \$2000, then this deed to be void, and *Thomas Lee* shall be seized of the said land, &c. subject to the trusts in the first recited deed.

Prudence G. Chalmers, in her answer stated, that her husband, *James Chalmers*, did rent a rope walk, &c. of the complainant, on certain terms, which she supposes are truly set forth in the agreement referred to in the bill, but she has no knowledge of any agreement in relation to a mortgage, to secure the return of said property. That said property, after being in the possession of said *Chalmers* about three years, was given up, and returned to *Chambers*, and she believes, that the agreement reserves to *Chambers*, under name of rent, an interest on the value of the rented premises, at, and after the rate of dividends, on stock in the

Union Bank, if those dividends should not be less than six per cent., in which respect she charges that the agreement was usurious and void. That some time after the execution of this agreement, and after her aforesaid husband had taken possession of the rope walk, &c. *Chambers* claimed of him a balance of \$4200, and insisted on having the same secured by mortgage, and upon its being refused him, he filed a bill as he has stated, on the agreement, for its specific performance. That prior to this, this defendant, by the devise of her father, had acquired an undivided interest in a valuable real estate, together with her brothers and sisters, and it was agreed between her, and her husband, and brothers, that she would concur in a sale of her interest therein, to be made by her husband, provided he would invest the proceeds in other real estate, which should be conveyed in trust, for her separate use. That her husband accordingly sold her estate, and applied the proceeds to discharge a mortgage, which he had given on a piece of property, previously purchased by him of one *James Hindman*, and then in compliance with the aforesaid understanding, conveyed a portion thereof to *Thomas Lee*, for her separate use. That at this time she did not know of any agreement, which her husband had entered into with the complainant, binding himself to give a mortgage of his estate, real and personal, if any such agreement was ever in fact made at all. That after the conveyance in trust for her benefit, *Chambers* represented to this defendant, that the same was invalid as respected his claim for a mortgage, and in order to induce her to direct that one should be executed to him, and as a consideration therefor, agreed to secure to this defendant's separate use, the sum of \$5000, which was the sole inducement for her so doing. That the representations made as aforesaid, by the complainant to her, in regard to the superiority of his claim for a mortgage, over the trust deed for her benefit, were untrue, and fraudulently made, for the purpose of unfairly depriving her, of her just interest in the trust property, and that the

mortgage, in the execution of which she was thus induced to unite, was fraudulently obtained. That complainant has not in any way secured this defendant the \$5000, as agreed, nor has he settled with her husband, for the purpose of ascertaining the precise amount which may be due him, as was stipulated at the time of the execution of the mortgage, it being then distinctly understood, that the sum mentioned in the mortgage was only nominal, and that an endorsement should be made upon it, that the amount actually due should be ascertained by a subsequent settlement. The complainant having complied with none of these engagements, this defendant, charges that said mortgage is wholly and entirely fraudulent, and void. And by way of *plea* to the said bill, she avers, and maintains that the said pretended conveyance of mortgage, is utterly void, and invalid, not only by reason of the circumstances set forth in this answer, but also in this, that by and according to the terms and conditions of the deed of trust to *Lee*, it was not competent to her, and she had not the right and authority, to make a valid conveyance by way of mortgage, of and according to the purport, terms, and provisions of said pretended deed of mortgage, and that she and the land and premises therein mentioned, are in no manner bound by the same.

The answers of the children of *Chalmers*, who were made defendants, after his death, state that they are ignorant of all the matters stated in the bill.

The general replication was filed by the complainant.

Mrs. Eleanor Lee, for the defendant deposed, that *Daniel Chambers* said he never blamed *Mrs. Prudence G. Chalmers*, in the transaction, and that he was willing to allow her \$3000, (which he understood to be her patrimony,) out of the same property on which *Mrs. Chalmers* resided, and upon which, the deponent understood, *Chambers* had a claim, by some instrument of writing; and that he, *Chambers*, employed *Mr. Philip Rogers* to call upon *Mrs. Chal-*

mers, and explain to her the propriety of accepting the \$3000.

In answer to a cross interrogatory, she stated, that in the conversation alluded to above, she heard something about a paper, which had been neglected to be recorded, and which related to the property, but whether the remark fell from *Chambers*, or the person with whom he was conversing, she does not know.

Thomas Lee's evidence was taken, under an agreement, that he might be examined before a justice of the peace, to have the same effect, as if taken regularly under a commission, for evidence, or a commission *de bene esse*; and as if the chancellor's order for his examination as a witness, had been obtained.

He stated that *Chambers*, to induce *P. G. Chalmers* to join in the mortgage, and as the consideration therefor, promised to secure her out of said property, or otherwise, the sum of \$3000, that being the amount mentioned by him to *Chambers*, and the amount of her money, paid for the mortgaged property. He further proved, that the amount mentioned in the mortgage was but nominal, the object being to secure such sum as might subsequently be ascertained to be due.

There was a commission also to take testimony, and some other proof was adduced, which will be found sufficiently adverted to in the opinions of the chancellor, and of this court.

BLAND, chancellor, (March term, 1828.)

The object of this bill is to have the mortgage deed recorded, and the property sold for the payment of the debt secured by it. It appears that the plaintiff having had certain dealings with the late *James Chalmers*, arising out of a contract bearing date the 1st day of November, 1806, they came to a final settlement some time prior to January, 1809, when it was found that the late *James* was indebted to the plaintiff in the sum of \$4,200, and to secure the payment of that sum, with interest from the 15th August, 1810, the

mortgage deed dated 1st July, 1811, was made, which, without any fraudulent intention on the part of the plaintiff, was, from accident or negligence, not recorded within the time prescribed by law.

The defendant, *Prudence*, takes various grounds of defence by her answer, one of which is, that the plaintiff's claim is usurious, and, consequently, that this mortgage security is utterly void, which, if true, would be as fatal to a regularly recorded and legal mortgage, as to an equitable one, in the situation of that now under consideration. It is not alleged, nor is there any thing that shows, that the not recording of this deed of 1st July, 1811, was imputable to any fraudulent intention of the plaintiff. The positions assumed by the defendant, *Prudence*, may, therefore, be examined, unembarrassed by any considerations arising from the present situation of this deed. The contract of 1st November, 1806, contains eight articles, but three of which, the first, second, and fifth, are, however, necessary to be considered in relation to this question of usury. They run thus: (the chancellor here recited the first, second, and fifth articles of the agreement, as before stated.)

In this, as in all similar cases, almost every thing depends upon the answer that must be given to the question, do the parties, in truth, stand in the relation to each other of borrower and lender? If they do, and the lender is to be paid more than legal interest, the contract is usurious and void, whatever may be its form or structure.

A mere loan of stock, upon an agreement to replace it at a certain day, or to pay the sum advanced and the dividends upon the stock in the mean time, is not usurious, because the lender may in fact be a loser, should the stock rise in value. *Tate vs. Wellings*, 3 Term Rep. 531. 1 Eden, 273. This, however, can only apply to public stocks, such as that of a bank, or of the government, which are transferable as a species of property of fluctuating value. But a party cannot be permitted, as in this instance, to set apart a certain portion of property, or the value of

property he has sold, and by assimilating it, in his contract to any public stock, to reserve upon its value interest beyond that which is legal, and equal to the dividends upon public stock. *De Butts vs. Bacon*, 6 Cranch, 253. In the first of these articles, a certain portion of the property is valued, and called stock. It is most manifest, however, that the identical same property thus valued, was not to be returned, but its estimated worth of \$3,000 only; and by the fifth article, a mortgage was to be given, that no loss may arise in either principal or interest, rents or wages, &c. Now there were rents and wages to be paid for property leased and hired, but there was no other sum than this \$3,000 mentioned in this contract, to which the terms *principal* and *interest* could apply; consequently, as to the property so valued at \$3,000, it must be regarded as a sale. Indeed, the plaintiff himself speaks of it as “the purchase of said materials,” and, therefore, as to that specified sum, it would be considered as a loan of so much money, the principal of which was thus expressly secured. And then the contract apparently assimilating this valuation to bank stock, stipulates that there should be paid upon it, quarterly, an interest equal to the dividends upon the stock of the *Union Bank of Maryland*, provided it did not sink lower than simple interest, but at all events legal interest, the principal and legal interest were not at hazard in any respect whatever, and the lender was to have the chance of getting more than legal interest, if the specified bank dividends should amount to more than legal interest. It is usurious to stipulate for the chance of obtaining such an addition to the legal interest. *Barnard vs. Young*, 17 Ves. 44. This usury relates only to the \$3000, which formed only one of the component parts of this contract, but that taint necessarily spreads over and vitiates the whole. *Harrison vs. Hammel*, 5 Taunt. 780. And, consequently, the contract of the 1st November, 1806, must be considered in all respects whatever, as utterly null and void.

The act of assembly declares, that all *contracts for money lent*, whereby there shall be reserved above the rate of six per cent. per annum, shall be utterly void. But the contract of 1st July, 1811, has every appearance of fairness upon its face. It is a stipulation for the payment of no more than principal and legal interest, nor is it shown to be in any way connected with any agreement by which more than legal interest is reserved upon that sum of money which is secured by it. There being then nothing apparent upon this mortgage itself, nor any thing else connected with it, which has a prospective view to the payment of more than legal interest, accruing from, and after the date therein specified, it must be considered as entirely valid, unless it is shown to be an assurance for carrying into effect the previous usurious contract, or to be in truth a covenant, whereby the usury agreed to be paid, and which had accrued under the original contract, was secured.

In order to contaminate the second security with the usury of the original contract, it must appear that the second security is a mere colorable shift to evade the act of assembly, devised at the time the money was originally lent, and the first security given; or that the second security is in truth no more than a continuation, renewal, or substitute of the original contract. *Cuthbert vs. Haley*, 8 Term Rep. 390. 4 Esp. Rep. 11. For a note or mortgage given as a collateral security for a judgment, will not be affected by usury in the contract upon which the judgment was obtained. *Belding vs. Pilkins*, 2 Cains Rep. 150. *Thatcher vs. Gammon*, 12 Massa. Rep. 278. And so too, where a note was given for a sum justly due, with an agreement that more than legal interest should be paid, and after sundry payments of the usurious interest, and a part of the principal, the old note was cancelled, and a new one given for the balance of the principal, reserving legal interest; the second note was held to be valid. *Chadburn vs. Watts*, 10 Massa. Rep. 121. *Stoyel vs. Westcott*, 3 Day, 350. But the parties are always allowed to recede from an illegal intention, formed

and expressed, but not executed. As where, after having entered into an usurious contract, they cancelled, and abandoned it altogether; and striking off the usury, entered into a new contract, securing the payment of principal, and legal interest only; such second contract will not be at all affected by the usury of the first. In such case, however, it must appear, that the second was not made to secure the performance of the first contract. *Wright vs. Wheeler*, 1 *Camp.* 165. *Barnes vs. Headley*, 2 *Taunt.* 184. The act of assembly declares, that all contracts, whereby more than six *per cent. per annum*, is reserved, shall be void; consequently, if the contract of the 1st July, 1811, be entirely new, and wholly distinct, from that by which the usury was reserved, it cannot be affected by it, or by any different and passed usurious contract between the same parties.

By the fifth article of the contract of the 1st November, 1806, it is stipulated that *James*, shall give a mortgage of all his property, to secure a compliance with every thing he had undertaken by that contract. The contract of the 1st July, 1811, is a mortgage of certain specified property, peculiarly situated, and a stipulation for the payment of a certain sum of money, with legal interest from a specified day. So far it appears, that these two contracts are essentially different, and wholly unconnected with each other. But the plaintiff in his bill states, that the contract of the 1st of November, 1806, was the original agreement; that an account was taken predicated upon it, by which it was found that *James* was indebted to him in the sum of \$4200, and that the mortgage of the 1st July, 1811, was given to secure the payment of the sum of money which had been so found due, which the mortgage itself recites; and by the proofs it is shown, that this mortgage was executed to secure the sum found due by *James*, upon the articles of agreement of 1st November, 1806; and there is nothing in the case which shows, either that the dividends on the specified bank stock did not exceed legal interest, or that in taking the account, the usurious interest was struck off or abandoned.

Hence it appears, that the mortgage was given expressly in fulfilment of the original usurious contract; and so far as regards the payment of the money stipulated to be paid by it, including interest equal to the dividends on the specified bank stock, the mortgage was distinctly considered by the parties themselves, as substituted for, and standing in the place of the contract of the 1st November, 1806, and having been so declared, it has succeeded to the infirmity and became contaminated with the usury of the original contract; and like the original, it is a contract whereby more than legal interest is secured to be paid, and must therefore be deemed utterly null and void.

Having thus come to the conclusion that this mortgage contract, which it is the object of the bill to sustain and enforce, is usurious and void, I deem it wholly unnecessary to notice any of the other matters of defence set forth in the answer of the defendant, *Prudence*, and which were so much relied upon in argument by her counsel.

DECREE, *that the bill be dismissed with costs.*

From this decree the complainant appealed to this court.

The cause came on to be argued before BUCHANAN, Ch. J., EARLE, MARTIN, ARCHER, and DORSEY, J.

Dulany, for the appellant.

1. The contract of 1st November, 1806, was not usurious. By returning a stock of rope and yarn of the same quantity, *Chalmers* would have fulfilled his contract. The \$3,000 was not the purchase money, nor was it stipulated that the rope, &c. to be returned, should be of that *value*. Such a contract, with the agreement in regard to the dividends, would have been usurious, because then, the principal would not have been at hazard. It is not contended, that the same *identical* rope, &c. was to be returned, but that articles of similar quantity and quality, were to be. When the contract speaks of the articles being worth \$3,000, the language is merely descriptive, and does not amount to a stipulation that the stock to be returned at the end of the

stipulated period, shall be worth that sum. The sum of \$3,000 was mentioned to avoid any difference, as to the amount to be paid, in case *Chalmers* did not elect to return the rope, &c. as he had a right to do. Upon his refusing to exercise this privilege, then, he was to pay the \$3,000, but not otherwise. The *principal*, then, was at hazard; because, although goods similar in quantity and quality might have been returned by *Chalmers*, still the *value* may have been much reduced by a depreciation in the market price of such goods, and, consequently, there could be no usury, no matter what the rate of compensation for the use may have been. *Ord. on Usury*, 38. In the construction of contracts, courts are always anxious to avoid that interpretation which imputes usury, if it can be done, without departing from the plain meaning of the terms employed.

2. If the contract was usurious, the defence of usury made by the defendant, *Prudence*, is not sufficiently stated in her answer. *First*, because it does not sufficiently aver, that by the contract, more than six per cent. interest might have been received—*Secondly*, because it does not sufficiently state, that the mortgage of 1st July, 1811, was given to secure more than the principal and legal interest; and, *Thirdly*, because it is not sufficiently stated that the parties intended to reserve usurious interest. The defence of usury must be well pleaded, and a bad plea is equivalent to none. *Ord.* 91, 92. *Faulder vs. Stuart*, 11 *Ves.* 302.

Every fact constituting the usury, must be positively stated in the plea, or averred in the answer, as a ground of defence. In this case, the answer does not allege that the lender would, at all events, or in any event, get more than legal interest. The averment is merely argumentative. Taking more than six per cent. is not usurious, unless there is a *corrupt* agreement to do so, and this must be *positively averred*. *Ord.* 37, 59. 7 *Bac. Abr.* 208, 209, 210.

Here the averment is not that the agreement was corrupt, but that the transaction was usurious, as disclosed by the

facts to which the court is referred, to determine its character. The answer should have shown the *quantum* of interest above the legal rate. 2 *Showers*, 329. 2 *Bac. Abr.* 209. 2 *Chitty's Pl.* 467. If all the facts supposed to constitute the usury, had been set out, the plaintiff would have had notice, and might have shown the absence of a corrupt intent. But suppose the original agreement was usurious, and the defence is sufficiently taken in the answer, it does not follow that the mortgage is so, nor is there any averment to that effect. Between the periods of the first agreement and the mortgage, the usury, if there was usury in the first, may have been abandoned, and therefore it was necessary that the answer should have averred the existence of usury, when the mortgage was executed, and this is not done. The allegation of usury, imperfect as it is, is confined to the first agreement.

3. Independent of the objection of usury, there is no defence of which the defendant can avail herself, there being no evidence, or at least no sufficient evidence, of the parol agreement stated in her answer. But even if the parol agreement was clearly proved, it would not be allowed to vary the terms of the written contract.

Taney, (Attorney General, U. S.) and *Mayer*, for the appellee.

1. The agreement of November, 1806, is usurious and void. The articles loaned, and the articles to be returned, are not specified. All the contract says on this subject is, that money to the amount of \$3,000 was to be returned, or articles of that value. The stipulation in regard to interest is, that six per cent. is certainly to be paid, and more, if the dividends on the designated stock should amount to more. Neither the principal nor legal interest, therefore, were at hazard, and, consequently, the stipulation for a contingent payment of more than six per cent. was usurious. *Barnard vs. Young*, 17 *Ves.* 44. *De Butts vs. Bacon*, 6 *Cranch.* 252.

The next question is, do the pleadings present such a case as to give the defendant the benefit of the defence of usury? Now the *bill itself* presents the usurious contract, and seeks to have it enforced, and, therefore, no plea, at all, was necessary. The bill itself is a bar to the relief prayed for. By the act of 1704, *ch.* 69, the contract exhibited with the bill is made usurious; independent of any corrupt agreement, if more than six per cent. is reserved, the contract is tainted with usury, and void. *Barnard vs. Young*, 17 *Ves.* 44. If, however, the frame of the bill does not preclude the complainant from recovering, the answer sufficiently sets up the defence. It states that usurious interest was intended to be reserved, and that is enough, without alleging the amount of the excess. The same strictness in pleading is not required in equity, as at law. In the former, it is necessary merely to give notice of the ground of defence, and parties are not entangled with technical rules. The defence here is taken by way of answer, but if it was by plea, and the case was at law, it would be too late for the plaintiff to avail himself of this objection, after having taken issue upon the plea. Having taken issue, the question of usury must be tried. 1 *Camp.* 166, (*note.*) If he meant to object to the sufficiency of the manner, in which the defence is presented, he should have demurred. The charge of the usury in the contract, applies to the mortgage. The latter refers to, and recites the former. It is not an independent security, not contemplated by the first contract; but was stipulated for by that contract, and executed in conformity with it. It partakes, therefore, of all its infirmities. *Cuthbert vs. Haley*, 8 *Term. Rep.* 390. *Wright vs. Wheeler*, 1 *Camp.* 166, *note* 3. If a party complainant asks the court to enforce a written contract, he cannot vary it by parol, and have it executed in its varied form. But here, the complainant asks to have the *entire* written contract executed, and refuses to perform a verbal stipulation, which he is in conscience bound to do. The attempt is to perpetrate a legal fraud, and parol evidence to

expose, and repel, such an attempt is admissible. The defence is not put on the ground of mistake, for there was no mistake. It is put on the ground of fraud, in refusing to fulfil a parol agreement, which was the inducement to the written one. The evidence shows, that the complainant has not a fair and equitable claim to the relief he is seeking, and consequently, is admissible, under the act of 1785, *ch.* 72, which requires the plaintiff, before he can have such relief as is asked here, to show a fair and equitable claim. Upon a bill for the specific performance of a contract, in regard to which the court have a discretion, parol evidence will always be let in, to show the want of an equitable claim to the relief sought. *Wesley vs. Thomas*, 6 *Harr. and Johns.* 24. 3 *Bac. Abr. Title Fraud.* 1 *Powel on Con.* 294, 427, 428. *Jerem. Eq.* 424, 434. *Woollam vs. Hearn*, 7 *Ves. Jr.* 211. *Higginson vs. Clowes*, 15 *Ib.* 516.

Johnson, in reply.

If the contract of 1806, and the mortgage, are both usurious, and the bill on its face presents an usurious contract, the defendant should have demurred. By answering, or pleading, the defects in this bill are waived. 1 *Eq. Cas. Abr.* 42. *Jones vs. Earl of Strafford*, 3 *P. Wms.* 80. *Mit. Eq.* 171.

In relation to this defence, therefore, the decree is to depend upon the case made by the answer, and not that made by the bill.

The application to the court was to record the mortgage of 1811, and as its execution is admitted, the *onus* of showing that it should not be recorded upon the ground of unfairness or fraud, in obtaining or failing to record in time, is upon the defendant, as the law does not *presume* fraud.

The bill does not seek to enforce the contract of 1806. Its only object is to enforce the mortgage, which is not alleged to be usurious in the answer, either positively or argumentatively. The charge of usury is levelled at the

contract alone, and the mortgage is impeached only on the ground of fraud. But suppose the usury spoken of in the answer is applicable to the mortgage, the next question is, is the defence sufficiently stated. Although, in a Court of Chancery, mere matters of form cannot be objected, yet defences by plea, must be substantially averred. *Tiernan vs. Poor and wife*, 1 *Gill and Johns*. 230. If the same matters which are contained in an answer in Chancery, would be bad in a plea, upon general demurrer at law, they are bad here, and the cases show that a plea at law, containing the facts averred in this answer, would be bad on demurrer. 7 *Bac. Abr.* 209. 2 *Showers*, 329.

It is said, that in an answer in chancery, the term "usury" is sufficient, because that term imports every thing, which constitutes the offence. If this be so, it would be equally good at law, which is not the case. The defendant must state the amount of the usurious interest, and the proof must correspond with the allegation. He cannot allege one rate and prove another. When a statute is pleaded, the party pleading must show himself entitled to its provisions. 1 *Mitf.* 214. The mere general allegation of usury does not give the plaintiff, notice of the character of the usury, which it is intended to rely on, and would, if tolerated, render evidence of any kind admissible, though the rule is, that the very kind alleged, and none other, must be proved. The plea should also aver the *intent* to take usurious interest. *Ord.* 37, 92.

The usury relied on in the answer, relates not only to the \$3000, but to the whole contract of November, 1806, though the rope walk, &c. mentioned in that contract, were merely hired to be returned in *specie*, and of course formed no part of the money, consequently, as the answer is not supported by the proof, it must fail. Suppose the dividends, spoken of in the contract, had been stated in the answer to be the dividends of some other stock, the defence must have failed, because of the variance between the alle-

gation and the proof. But although the contract may be usurious, and the answer sufficiently presents the defence, it does not follow that the mortgage is not good. 2 *Saun.* 184.

2. The defendant claims an interest in this property as a mere volunteer. The deed for her benefit, does not appear upon its face, to have been made in pursuance of any *anti-nuptial* contract.

It is said that her answer, as to the consideration upon which this deed is made, is evidence; but such evidence is inadmissible, as being explanatory of a written contract. *Jones vs. Sluby*, 5 *Harr. and Johns.* 372. The deed appears upon its face to be purely voluntary, and another character cannot be given to it by evidence. *Betts vs. Union Bank*, 1 *Harr. and Gill*, 175.

3. The contract of 1806 is not usurious. By the first and fifth articles, *Chalmers* was authorized to return the stock at his pleasure. The fifth shows, that the specific stock was to be returned; and this article also, restrains *Chalmers* from disposing of it, without the consent of *Chambers*, which restriction is incompatible with the idea of a sale. And the object in stating the amount of the stock, was only to secure *Chambers*, if it should be parted with, without his consent. In the case in 17 *Ves.* 44, relied on, on the other side the option of being paid, or receiving the article again, was with the *lender*.

In 4 *Ves.* 678, as in this case, the borrower has the option, either to pay the money, or restore the property, and therefore, no matter what the compensation, there can be no usury. *Ord.* 25.

ARCHER, J., delivered the opinion of the court.

According to the established practice of Chancery in this State, it may be taken to be a general rule, that a defendant, although he answer the bill, and issue be thereon joined, may at the hearing object, that the case made in the bill, does not entitle the party to equitable relief; and if his ob-

jection be sustained, the bill will be dismissed. *Gover vs. Christie*, 2 *Harr. and Johns*. 67. *Drury vs. Conner*, 1 *Harr. and Gill*, 220. *McAttee vs. Johnson*, M. S. *Peale vs. Gas Light Co. M. S.*

This rule, however, as it regards some defences, at least, given by statute, cannot apply. Thus, limitations must always be pleaded, both at law and in equity, and in neither tribunal is it good ground to object to the recovery, that the plaintiff's pleadings, on the face of them, show a case barred by limitations; because, although apparently barred, evidence may show that the statute does not bar, for there may have been acknowledgments, which take the claim out of the operation of the statute. And to permit the objection to be taken at the hearing, when the defence has been put upon other grounds, would at all times enable the defendant to take the plaintiff by surprise, and deprive him of an opportunity of vindicating his rights.

The same doctrine, though not perhaps to the same extent, prevails where reliance is placed by a defendant, upon the usurious character of the contract set out in the bill, as the foundation of the plaintiff's proceeding. Where a bill for the specific execution of a contract, states a case which may, or may not be usurious, according to the facts which really exist in the case, it is apprehended, that the statute of usury must always be pleaded, or relied upon in the answer, and for the same reason which requires the pleading of the statute of limitations. For if the defence of usury had been pleaded, those allegations in a bill, from which the inferences of usury are argumentatively drawn, might be shown by evidence to be susceptible of other deductions, rendering transactions to which they refer entirely innocent and legitimate. If this be so, to permit the defendant to place his defence upon other grounds, and at the hearing insist upon usury, would in many instances, work great injustice.

If indeed a case were stated in a bill clearly usurious, which no inference or intendment could help, it might be governed by different considerations, and would perhaps

fall within the general rule above adverted to, which authorises the dismissal of a bill at the hearing, no matter what may be the defence, where it clearly states no case for equitable interposition.

Does the bill then state a case clearly usurious, one which no inference or intendment can aid? We clearly think it does not. The contract of 1806, in some of its articles between these parties, may be conceded to be usurious, and it does stipulate for the execution of a mortgage, to secure the performance of its provisions, as well those which are usurious, as those which are not; and the bill states, that a liquidation of the claims of the parties was made, and that a mortgage was executed in pursuance thereof. These allegations would *prima facie* present to the court, the mortgage as attainted with the usury of the original contract.

But the contract of 1806 is clearly divisible, containing independent, unconnected stipulations, and if the defendant had rested his defence upon usury, the plaintiff might have shown by evidence, that the debt for which the mortgage was taken, was one originating solely from the rents of the land referred to in the articles, and the hire of the negroes, and for the use of the utensils, for the manufacture of rope, without any reference to those separate and independent clauses in the agreement, upon which a usurious interest has been reserved; that all the accounts for the stock of rope and yarn, in relation to which it is above objected, that the instrument was usurious, had been settled and adjusted long anterior to the mortgage, and that the liquidation of accounts had between the parties upon which the mortgage was founded, was entirely in relation to other property, placed in the hands of *Chalmers*. It is therefore manifest, that by dismissing the bill upon its allegations merely, we should be pronouncing that to be usurious, which the complainant would not be debarred, by any allegation in his bill, from showing by evidence was clearly innocent and

lawful. These views of the bill bring us to the consideration of the answer. Is usury sufficiently averred?

In this examination, it is unnecessary to inquire, whether the defendant should be held to strict technicality in the presentation of his defence; for whatever be the rule in that respect, we are clearly of opinion, that after issue joined upon an answer alleging usury generally, it could not be objected, that the defence had not been taken with more legal precision. It could not it seems be done even at law. 1 *Camb.* 165, *in notes*. And it would be against all rule, to carry greater strictness into a court of equity, than prevails at law.

It is laid down in *Hood vs. Inman*, 4 *Johns. Ch. C.* 437, that pleadings in Chancery should consist of averments, or allegations of fact, and not of inference and argument.

Adopting this principle as the correct rule, it is very clear, that the answer nowhere avers usury in the mortgage. It does not directly aver it, nor indirectly, by any certain inferences. Every thing which is stated in the answer may be true, and yet it by no means will follow that the mortgage was usurious. It does, it is true, state that it was taken to secure a debt, alleged to be due under the contract of 1806; but we have seen, in our examination of the bill, that although this might have been the case, the debt for which the mortgage was taken, may have entirely grown out of independent clauses in the contract, not repudiated by usury. But even the debt is denied, nor is it admitted that the mortgage debt was one accruing under the anterior contract, and it is even in effect asserted, that all claims under the contract, were overbalanced by counter-vailing claims. And, independent of all this, the defence to the mortgage is clearly and distinctly put upon the ground of fraud, from certain representations and promises made to the respondent by the mortgagee, which constituted her inducement to enter into the mortgage, and which having as she alleges been fallacious, and remaining unexecuted, to enforce the mortgage, would be to enable the complainant

to perpetrate a fraud on her. The complainant thus notified, that fraud is the defence, must necessarily be surprised, if on the hearing, his case, by strained constructions, and argumentative deductions from the answer, is compelled to vindicate his contract from the imputation of usury.

The averment, that the original contract of 1806 was usurious, by no means helps the averments of the answer. To make it efficacious it should have been followed out with the further statement, that the mortgage was given in pursuance of the contract, to secure the usurious interest, by it stipulated to be paid.

The state of these pleadings require, therefore, that the defence should be placed upon other grounds than usury. These will now be examined, and they will be found to be two-fold.

1st. The alleged stipulation, to endorse on the mortgage, that the sum thereby secured, was only nominal, and that it was intended to secure the sum which, on settlement between *James* and *Daniel Chambers*, should be found to be really due.

2. The alleged agreement of *Daniel Chambers*, with her and her husband, as a consideration for her entering into the mortgage, to secure to the respondent, the payment of five thousand dollars, as an equivalent for the interest, she avers she had in the land mortgaged.

In relation to the first ground assumed, it may be remarked, that it is not only not proved, but is in effect disproved by the testimony of *N. Brice*, who proves the declarations of both *Chambers* and *Chalmers*, that the amount of debt mentioned in the mortgage was due.

The second ground of defence is not supported by *Mrs. Lee*, as from her cross examination it is manifest, that she refers to the declarations of the complainant at a time subsequent to the delivery of the mortgage to him, and it rests therefore solely on the evidence of *Thomas Lee*. It would be unnecessary for us to say, what should be the effect of such evidence, if it comes from an incompetent source, and

we think the witness was incompetent. He was a defendant, and properly joined in the suit as a co-defendant, having united with *Mr. and Mrs. Chalmers* in the execution of the mortgage, and was clearly liable for costs. The agreement for his examination, which places it on the basis of one taken under the chancellor's order, can make no difference. In all such cases, the exception may be taken at the hearing. Such orders are always made, saving just exceptions. The reason why one co-defendant is permitted to be examined for another, is stated, by *Lord Eldon, Murray vs. Shadwell*, 2 & 3 *Ves. & B.* 404, to be this, "that if the plaintiff joins persons in a suit, in which he has cause of suit against one, upon one subject, and against another, as to a different subject, but having no cause against them jointly, unless the court permits this examination, the plaintiff, making both defendants in the same suit, would by that sort of mechanism, deprive one of the defendants of the others evidence." In this case however, these defendants were properly joined, and have an interest in the same subject matter, and must be affected by the same evidence. And although *Thomas Lee* has only the interest of a trustee in the result of the decree, in relation to the subject matter in controversy, yet he is personally responsible for costs if the suit go against the defendants. The second ground of defence, by the rejection of *Thomas Lee's* testimony, is just as unsupported by testimony as the first.

Entertaining these views of the subject before us, that usury is not relied on as a defence; that in the shape the bill assumes it cannot be objected on the hearing, that it exhibits an usurious transaction; and that the defences of fraud, are wholly unsupported by competent testimony, the decree of the chancellor is reversed with costs; and this court will proceed to decree, that the mortgage shall be admitted to record, that the mortgage premises shall be sold, and that the cause shall be remanded to the Court of Chancery for further proceedings.

Burch and Mundell vs. State.—1832

JOSEPH N. BURCH and THOMAS MUNDELL vs. STATE,
use of McPHERSON and WIFE.—December, 1832.

Where the personal estate of an intestate consists of slaves, a distributee cannot recover from a delinquent administrator and his sureties, both the appraised value, and the increase, and hire of such slaves, from the time of granting letters or appraisement. He may claim their appraised value and interest thereon, or their increase and hire up to, and real value at, the time of bringing his action. But the pleadings must disclose which course he elects to take.

By recovering the value of the slaves, the distributee casts upon the administrator, the title to the property from the period to which the recovery relates.

Where a defendant filed an account in bar, charging the plaintiff with board, clothing, and expenses, to which *non assumpsit* and limitations were pleaded, the plaintiff cannot at the trial, for the purpose of showing that the defendant is entitled to no credit for such matters, prove that the defendant entered upon, and received the rents and profits of the plaintiff's real property.

The rents and profits of land received by a mere trespasser, cannot form the basis of a set-off to a claim founded upon contract, made by such trespasser.

The rule that a trespasser, who enters upon an infant's real estate, shall be charged as a guardian, is a fiction of a court of equity only.

A set-off to be available as such, must always be pleaded, or filed in bar.

APPEAL from Prince Georges County Court.

This was an action of *Debt*, instituted by the appellee against the appellant, and one *Thomas N. Mudd*, who died pending the suit, on the bond of *Burch*, one of the appellants, as administrator of *Walter S. Parker*. The bond bears date on the 19th of May, 1817, and is in the penalty of \$20,000.

The defendants pleaded general performance by the administrator, *Burch*.

The replication alleged, that *Parker* died intestate, leaving a widow and eight children, of whom *Elizabeth*, the wife of *McPherson*, was one. That letters of administration on his estate were granted to *Burch*, who returned an inventory of his personal estate, into the proper office, amounting to \$14,324 85, and after obtaining credit for sundry disbursements, there remained in his hands a balance of

\$10,893 19, for distribution among the widow and children, the widow being entitled to one-third. That the increase, earnings, and hire, of the negro slaves, contained in the inventory returned as aforesaid, which were received and possessed by the said administrator, but with which he has not charged himself, amounted to the further sum of \$10,000, which is likewise to be divided between the said widow and children of the intestate. That the residue of the personal estate of said *Parker*, including the increase, and hire of the negro slaves aforesaid, after all payments, &c. and widow's thirds deducted, amounted for the said *Elizabeth's* proportion, to the sum of \$1741 52, which the said administrator, though often required, had refused to pay, &c.

The defendants rejoined, 1. That there did not remain in the hands of the administrator the sum of \$1741 52 due the said *Elizabeth*, as alleged in the replication; and 2. Payment by the administrator.

Issues were joined upon the defences set forth in the rejoinder.

The defendants also filed an account in bar, charging *Elizabeth*, with board, clothing, and other expenses, furnished by the administrator, from the death of her father, in 1817, amounting to the sum of \$1200. To this account in bar, the plaintiffs pleaded *non assumpsit*, and limitations.

1. At the trial the plaintiff offered in evidence the inventory of the personal estate of the deceased, returned as aforesaid, by the administrator, amounting to \$14,324 85, and the first account settled by him with the Orphans Court, on the 2d of December, 1818, by which there appeared a balance of \$10,893 19, remaining in his hands.

The defendants then read to the jury several subsequent accounts, passed by the administrator with the court, in which he had charged himself with the proceeds of crops, made on the lands of the intestate, the last of which accounts, was on the 23d of October, 1829, reducing the balance to \$4,477 14. The plaintiff thereupon offered to

prove, what was the annual value of the negroes, contained in the inventory, subsequently to the appraisement, and claimed in this action the hire of said negroes, from the date of the granting of the letters of administration to *Burch*, until the time of the institution of this suit. The defendant objected to this proof and claim, and contended, that if the plaintiff was to receive the value of the negroes, at the time of the appraisement, and according to the appraisement, he could not claim the hire of the negroes afterwards. The court, (STEPHEN, Ch. J., and KEY, A. J.,) admitted the evidence, and instructed the jury, that under the pleadings in the cause, the plaintiff was entitled to recover, not only the proportion of said estate, to which *Elizabeth* was entitled, according to said settlement, but might also claim for the hire of the negroes aforesaid, from the time of the grant of the letters of administration, up to the institution of this suit. The defendants excepted.

2. The defendant having offered evidence in support of his account in bar, the plaintiff, for the purpose of showing that the defendant was entitled to no credit for the same, proved that *Walter S. Parker* died seized of a real estate which descended to his children. That the defendant took possession of the same, cultivated it, and received the crops thereof, and contended, that the proceeds of said real estate, were to be applied to reduce the claim of the defendant, as stated in his account in bar. The defendant objected, and insisted, that as in this action the plaintiff claimed only the personal estate, and had called on the administrator to account for the same, he could not, in support of his pleas, and to extinguish or reduce the account in bar, offer any proof relative to her claim, against the said *Burch*, for the real estate. But the court admitted the evidence, and instructed the jury, that if they should be opinion, that the profits of said real estate had been received by the said *Burch*, and applied to the maintenance of the plaintiff, and her brothers and sisters, her share was a legal set-off against the claim of the defendant, stated in his account in bar. The

defendants excepted, and the verdict and judgment being for the plaintiff, they brought the case by appeal to this court.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, ARCHER, and DORSEY, J.

A. C. Magruder, and *Stonestreet*, for the appellants, contended.

1. Although the plaintiff below, might have a right to claim, at *their election*, either the value of the property at the time of its original appraisement, with interest thereon, from the time when the settlement and distribution ought to have been made—or might have sued for the non-delivery to the plaintiff, of the negroes, and other property, at a subsequent period, and the non-payment of the hire of the negroes to that period, yet having charged the administrator in the replication, and the proof to the jury, with the value of the personal estate at the time of taking the inventory, as assets converted then into cash, the plaintiff could claim no hire for the negroes, as a part of these assets converted into cash, subsequently to the appraisement; but must be contented with her share of the value of the assets, with interest thereon, from the time, when by law, such sum of money ought to have been paid. 2. That the breach in the replication, only authorized the plaintiff to claim a share in money, and according to the appraisement with interest, and amounted to an abandonment of her claim to be paid for the hire of the negroes, to which she would have been entitled, had a different breach been laid. 3. The defendant's claim for board, &c. of the plaintiff *Elizabeth*, was properly to be allowed in the settlement of the personal estate, and the plaintiff below had no right in the trial of this suit upon the administration bond, to set up, and to have adjusted any claim, which she might have against the individual who was the administrator, on account of the real estate, whether such claim existed against him as guardian of the distributee, or as a trespasser. 4. But if such a claim could

be set up at all, notice, at all events, should have been given the defendant.

Johnson, for the appellee.

1. The replication only claims the plaintiff's share of the property, as appearing to be due by the settlement with the Orphans Court, and the hire, &c. of the negroes received by the administrator, with which he had not charged himself, and the instruction of the court to the jury goes no farther. *Hall and Gibson*, 2 *Harr. and Johns*. 485.

2. It is not alleged by the defendant, that the amount charged the plaintiff, *Elizabeth*, in his account in bar, was any part of the personal estate.

Burch was in possession of two funds belonging to the plaintiff. One arising from the personal estate, the other from the realty; and as he did not apply the sum mentioned in his account in bar, to the extinguishment of the personal debt, the plaintiff had a right to say that he should take his satisfaction out of the real fund. But the instruction of the court is entirely free from any objection, as it simply says, that the jury must believe that the profits of the real estate were received, and actually applied to the support of the plaintiff, *Elizabeth*; and as the objection of the defendant, was not, that there was no evidence in support of the opinion, the court will presume that there was evidence. *Barnes vs. Blackstone*, 2 *Harr. and Johns*. 376. The instruction goes no farther than to say, that the defendant shall not be allowed his account in bar, if the jury believe he had paid himself out of the proceeds of the real estate. He further insisted, that when the defendant took possession of the plaintiff's land, he became in law her guardian. *Drury vs. Conner*, 1 *Harr. and Gill*, 220. *Gibbs vs. Claggett*, 2 *Gill and Johns*. 14. *Hungerford vs. Bourne*, 3 *Gill and Johns*. 131.

DORSEY J., delivered the opinion of the court.

The plaintiff below, by the replication, did not allege, as the gist of his action, the failure of the defendant to deliver

in *solido*, the just proportion of the personal estate of the deceased; but elected to claim the value thereof, as appraised in the inventory, and as appearing to be due on the face of the accounts passed by the administrator with the Orphans Court; and claimed also, a large sum of money, as the earnings and hire of the negro slaves, not accounted for in said settlement. This is a true exposition of the plaintiff's demand, as exhibited on the face of the replication. At the trial, the plaintiff having proved the balance appearing due by such settlement, offered to prove the annual value of the negroes subsequent to the appraisement; claiming their hire, from the date of the letters of administration until the institution of this suit.

To this proof and claim, the defendants objected, and contended, "that if the plaintiff was to receive the value of the negroes, at the time of the appraisement, and according to the appraisement, he could not claim the hire of the negroes afterwards." But the court instructed the jury, that under the pleadings in the cause, the plaintiff was entitled to recover, not only the proportion of the estate to which the said *Elizabeth* was entitled, according to the settlement, but the hire of the negroes with which the defendant was charged in said settlement, from the granting of the letters of administration to the commencement of this suit.

The hire of the negroes, with which the administrator had debited himself, was continued down to the year 1827, inclusive. This instruction of the County Court is not marked with that perspicuity and precision which would preclude all question or doubt, as to what they meant to decide. If they intended to direct the jury, that the proportion of the estate to be recovered, was damages for the non-delivery in *solido et genere*, then they were in error, because the pleadings in the cause did not warrant such a recovery. If their meaning was, that such proportion should be that which appeared due by the settlement, (which embraced the appraised value of the negroes,) then the court erred, because the the defendant is not liable for both the

appraised value, and hire of the negroes. A plaintiff, who in a case like the present, in consequence of the delinquency of the administrator, in not settling up and distributing the estate in a reasonable time, charges him in a suit on the administration bond, with the appraised value of the property, can only recover it with interest thereon. If the distributee elects to claim the hire, or earnings of the negroes, not distributed nor sold, and accounted for accordingly, he must allege, as part of the *gravamen* of his action, not the non-payment of their appraised value, but their non-delivery. By recovering such their value, he casts upon the administrator the title to the property, from the period to which the recovery relates; and from that time can have no claim to the hire or earnings. Upon these principles, the rights of the parties are preserved, and justice is administered to all. Every reasonable advantage is extended to the distributee, by affording him the privilege of electing his remedy. To permit him to claim all the profits arising from the estate, and then throw it upon the hands of the administrator at its appraised value, it may readily be imagined, would be fraught with results of the grossest injustice. As for example, the estate might consist of negroes, who, being in the prime of life, might be hired out until their value was reduced more than fifty *per cent*. Could it be insisted, that under such circumstances, the distributees might exact from the administrator, the inventory appraisement of the negroes, and all their subsequent earnings. The law would not tolerate a proceeding so glaringly unjust. *Edelin vs. Jackson*, determined by this court at June term, 1830, has been referred to as warranting the opinion of the County Court. But the decision there does not in the slightest degree conflict with that now given in this court. The only questions there adjudicated were, that the hire of the negroes received by the administrator was assets in his hands; that it could not be recovered at law by a distributee, unless the issues were so formed as to embrace it.

That in the case then under consideration it was not covered by the issue.

This discloses our view of the first bill of exceptions. The second exception presents a different question. The defendant having filed an account in bar, charging the board, clothing, and expenses of *Elizabeth*, (for a number of years after the intestate's death,) to which *non assumpsit* and limitations were pleaded; the plaintiff at the trial offered evidence, that the intestate died seized of a real estate, which descended to his children, of whom the said *Elizabeth* was one, and that the defendant, *Burch*, took possession of and cultivated the same, and received the crops therefrom.

The object in offering this testimony, and the grounds upon which it was objected to, are stated in the bill of exceptions. The court admitted the proof, and in the propriety of their so doing, we cannot concur with them in opinion. There was nothing in the pleadings to which such testimony was applicable.

If such a defence existed to the account in bar, it could not have been made in the manner attempted, without subverting the whole doctrine of set-off, and filing accounts in bar, in courts of law, as practiced in this State. It could not have been anticipated by the defendants, nor could they be expected to have come prepared to meet it. With as much propriety could the defendants' account have been given in evidence on the trial, without being pleaded or filed in bar, as could the testimony thus offered by the plaintiff. But we wish not to be understood, as intimating that the plaintiff could have sustained the defence attempted to be made, even though pleaded by way of set-off, or filed as an account in bar. In occupying the real estate, there is nothing in the evidence in the cause that presents the defendant, *Burch*, in any other character than that of a mere trespasser, except the charges he has made against himself in his settlements before the Orphans Court. But these entries are no evidence of any contract to account for, or

apply the profits in any other mode than that pursued by the defendant. It has been urged, that *Elizabeth* was an infant, and, therefore, although *Burch* was, in fact, a trespasser, yet, in contemplation of law, he must be looked upon as her guardian, and account for the profits of her real estate in that character. The brief answer to this suggestion is, that the evidence of infancy does not appear in the record, and if it did, that this salutary fiction of law does not extend beyond the confines of chancery jurisdiction.

But conceding that the court were right in admitting the evidence, their instruction was clearly erroneous, as they submitted to the jury the finding of a fact, of which no testimony legally sufficient for that purpose, had been adduced before them. They authorized them to find that the profits of the real estate had been applied to the maintenance of *Elizabeth*, her brothers and sisters, when not a *scintilla* of proof had been offered to show such application. On the contrary, instead of thus applying them, the accounts settled by the administrator with the Orphans Court, showed that he had charged himself with them as part of the personal estate, and had either paid them away in satisfaction of debts and disbursements, or held them still in his hands, as part of the general balance of the intestate's personal estate.

If, however, there was proof of such application, the instruction given by the court for another reason could not be supported. The jury were told "that if they were of opinion that the profits of the real estate had been received by said *Burch*, and applied to the maintenance of the plaintiff, and her brothers and sisters, her share was a legal set-off against the claim of the defendant, stated in his account in bar." Should it then have appeared to the jury that nine-tenths of *Elizabeth's* share had been applied to the maintenance of her brothers and sisters, and but one-tenth to that of herself, yet under the court's direction the whole amount of her share must have been deducted from the defendant's account in bar. The word "set-off," we do not understand as having been used by the court, in its legal or

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technical sense, but as synonymous with abatement or reduction. A set-off, to be available as such, must always be pleaded.

Dissenting from the County Court on both of the bills of exceptions, we reverse their judgment.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

WM. GWYNN vs. DORSEY, Adm'r of G. HOWARD of BRICE.
December, 1832.

An administrator who employs an agent to collect money for the estate under his care, no resort being had to legal process, and the agent being neither a public officer nor an attorney, is not entitled to charge the estate with the compensation of such agent.

The Orphans Court have a limited discretion with regard to the amount of an administrator's commissions, and also as to the time and manner of making the allowance.

The Orphans Court should aim to make the commissions allowed by them correspond with the duties performed, and in passing every account should look to the advance made in the administration of the assets.

Where an administrator, in the execution of an order for the sale of his intestate's estate, took a bond with one surety for \$72, which not being paid, he did not sue until one term after the day of payment of the bond had passed, but upon obtaining judgment, issued a *fi. fa.* which did not procure the money, he is not called on to prove the sufficiency of the bond, to obtain a credit for such sale, nor is the failure to sue at the first term, of itself an act of negligence.

Where an administrator manifestly intends fairly to do his duty, the rule should be, not to hold him liable upon slight grounds.

The Orphans Court have the power to make an administrator account for interest on money belonging to the estate, which he has applied to his own use, or neglected to distribute and pay over.

Where a sale is made under the authority of the Orphans Court, upon credit, the purchase money to be on interest until the expiration of the term of credit, it is not improper in the administrator to receive the money after the sale, before the expiration of the credit, and thus stop the interest.

An administrator may be held to pay interest, from the time he received money belonging to his estate, if he applied it to his own use and profit; and from the end of thirteen months after the date of his letters, if he kept it by him without any apparent reason, and omits to distribute it among creditors.

Gwynn vs. Dorsey, adm'r of Howard.—1832.

APPEAL from the Orphans Court of *Anne Arundel* County.

A petition was filed by the appellant in this case, on the 10th of January, 1832, which stated that the petitioner, as assignee of one *Benjamin H. Mullikin*, had a large claim against the intestate of the appellee, upon a judgment rendered against him in his life-time, which had been duly proved, passed, and exhibited to the appellee, by whom a part had been paid. That the appellee, under the order of the court, on the 22d of February, 1827, sold the personal estate of the intestate at public sale, which produced the sum of \$4288 53. That by the terms of sale, the purchasers for all sums exceeding \$20, were to give their notes at six months, with interest from date. That the appellee did not pay to the petitioner any portion of the proceeds of sale, for more than two years thereafter, and that he has not charged himself with the amount of interest received, or that might have been received by him, on the proceeds of the sale. The petition then asks, that the administrator may be required to answer, and give information on all these matters, and that he shall be made to account for interest, on all sums by him received, &c.

The *answer* stated, that at the time of the sale referred to in the petition, the respondent received a letter from the said *B. H. Mullikin*, informing him, that he had recovered a heavy judgment against his intestate, and warning him against paying away the assets, until said judgment should be satisfied. That shortly afterwards, the respondent was notified of the existence of other judgments against his intestate, and that those judgment creditors denied the validity of the claim of *Mullikin*, insisting that it was subject to a large credit, which had not been allowed. The answer then gives a history of the defendant's several settlements in the Orphans Court, and alleges, that in his last and final account, he has charged himself with all the interest he has received.

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The following statement of facts was then agreed upon.

It is admitted that the defendant did, on the 30th January, 1827, obtain from the Orphans Court of *Anne Arundel* County, letters of administration on the estate of *George Howard of Brice*, and on the same day obtained from that court, an order to sell his personal estate, on the following terms; cash for all sums less than \$20, and a credit of six months, with interest from the purchaser, to be given on bonds, with good and sufficient security, for sums exceeding that amount. That on the 19th of February following, the inventory was returned, and on the 22d of the same month, the account of sales was returned, by which it appeared, that the amount thereof was \$4,288 53½, of which \$1,144 44½ was received in cash, although there was only \$127 85 received from purchasers under \$20. That the first account of the administrator was passed on the 9th February, 1828, wherein he is credited with \$138 26, for disbursements and costs, leaving a balance due the estate of \$4157 68½. That a summons was issued to October term, 1828, for the administrator to appear, and account for the said estate, which was not served. It was renewed to December following, and returned served; whereupon an order was passed, directing the administrator to make distribution of the estate of the intestate, on the 17th January, 1829. That the administrator, on the 21st January, 1829, passed a second account, wherein he is allowed credit for \$518 02¼, as disbursements, allowances, and costs, in which is included 10 per cent. commission on the amount of the property, as appraised by the inventory, and five per cent. commission on the debts collected; and is credited in said account with \$1,924 47, the balance of cash then in the hands of the administrator agreeably to his statement, distributed among the preferred creditors of the intestate; to wit, three creditors holding judgments against the intestate, amounting to upwards of \$33,000, the said *Gwynn's* judgment being about six-sevenths of said judgments. That then the court indulged the administrator in the further distribution

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of the estate, till April, 1829; then till August, 1829; then till October, 1829; then till January, 1830; then till February, April, and June following, respectively. That in July, 1830, the said *Gwynn* had the administrator cited to appear before the court in August following, to settle his accounts. That on the return thereof, an attachment issued to December following, which was renewed to February, 1831. That on the 10th February, 1831, the administrator passed a third account, in which he was allowed a credit for some small charges against the estate, and \$1682 29, of cash stated to be at that time in his hands for distribution, among the said judgment creditors, leaving a balance due the estate of \$42 89. That an attachment issued to October 1831, requiring the administrator to close his administration. That on the 22d May, 1832, the administrator appeared before the Orphans Court, and on the 29th of the same month passed his final account, in which the accountant charges himself with various sums for interest, received from the purchasers at the sale. Among the credits in this account, there is the sum of \$17 28, for commission paid by the administrator to *Samuel Brown* for collections. That said *Brown* is not an attorney at law, and that there was produced no proof to show that any of the debts by him collected were by legal process. That credit was also obtained for \$79 70, the amount of the purchase, at the said sale made by *Levi Shipley*, for which he gave his bond, with *Edward Shipley* as surety. That said bond, with six months interest thereon, was due on the 22d August, 1827. That suit upon the same, was first brought to April term, 1828, of the *Anne Arundel* County Court, and judgment was obtained thereon, at the April term, 1829. That execution of *fieri facias*, issued upon the judgment, to the October term ensuing. That the sheriff levied on, and sold all the property of *Edward Shipley* under the said execution, and one other execution from the same court, and on various executions on judgments, rendered by justices of the peace, for a sum of money less than the value of the said property,

and which was inadequate to pay the judgments aforesaid. That the sheriff returned the other execution, which issued from the County Court, and upon an admitted statement of facts, the court adjudged the sale to be valid; and the purchase money was so applied, that no part was credited to the judgment obtained as aforesaid, against *Levi* and *Edward Shipley*. That no property was taken under the execution as belonging to *Levi Shipley*, but he is admitted to have been insolvent since. That said *Edward Shipley* was in possession of property on the day of the purchase sufficient to pay all the debts of record against him, and the said bond for the purchase money. That the execution of *Dorsey* against the *Shipleys* has not been returned or renewed, nor has any other execution issued on said judgment. That the sheriff was ruled to return the same, and it has been continued, because no property of the debtors can be found, which might be taken in execution.

Upon this statement of facts, the following questions were submitted to the Orphans Court.

1. Whether, or not, the administrator should be charged with a larger sum for interest?
2. Whether, or not, the administrator should be credited with the \$17 28, paid *Brown* for commission.
3. Whether, or not, the administrator should be credited with the bond of *Levi* and *Edward Shipley*?

The Orphans Court decided the three questions in favor of the administrator; and thereupon *Gwynn* prosecuted the present appeal.

The cause came on to be argued before BUCHANAN, Ch. J., EARLE, MARTIN, STEPHEN, and ARCHER, J.

Randall, for the appellant.

1. The policy of the law is to compel administrators to settle their accounts speedily, and they should therefore pay interest for every default. When the court directs a sale on a credit, and an executor or administrator, in disobe-

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dience of that order, sells for cash, he should be made to account for the interest, which would have accrued on the proceeds of the sale, if the court's order had been complied with. *Ringgold vs. Ringgold*, 1 *Harr. and Gill*, 77. 1 *Brown, Ch. Cas.* 359. 3 *Ib.* 73. He insisted that an administrator should not be allowed his commission until the passage of his final account, as not until then could the court say, how he had discharged his duty, which was the rule by which the court's discretion, within the limits allowed by law was to be determined. 2. The commission paid to *Brown* should not have been allowed. It was not paid for collecting or securing a claim due the deceased, nor was *Brown* an attorney.

3. An administrator is responsible if he fail to take good security for property sold by him. He may not be liable for the eventual responsibility of the names he may take, but he is at all events answerable, if they be insufficient at the time he receives them, and the *onus* of showing this, is upon him. Now, in this case it does not appear that the *Shipleys* ever were good. Besides, here, the administrator has been guilty of *laches*, in not suing the bond to the first term after it became due. He cited 1 *Harr. and Gill*, 88, and 1 *Jacobs and Walker*, 40.

Alexander, for the appellee.

1. There was nothing wrong in the administrator's taking *cash*, instead of notes at the sale, as the object, in ordering a sale on a credit, is not for the sake of the interest which may arise, but for the purpose of exciting competition among the purchasers, and that object is effected by giving them the option to pay cash or not, as may be most convenient to them.

With regard to the allowance of the commission to the administrator, he argued, that was a matter altogether within the discretion of the Orphans Court, whose conduct in this respect, could not be revised here. The same may be said with reference to the commission to *Brown*. This

court cannot review the conduct of the Orphans Court in this respect.

2. There is evidence, that the *Shipleys* were good for the amount of their note, at the time it was given, and it cannot be said, that under the circumstances of this case, the administrator has been guilty of that degree of *laches*, which should render him personally responsible.

EARLE, J., delivered the opinion of the court.

This case presents three questions for consideration. They were decided by the Orphans Court of *Anne Arundel* county, and are brought before us, on the appeal of *William Gwynn*, in a dispute concerning the settlement of the administration accounts of his debtor, *George Howard of Brice*, on whose estate *Roderick Dorsey* administered. The Orphans Court made certain allowances to the administrator, which *William Gwynn* thought objectionable, and refused to make him account for interest, with which it was contended he was chargeable.

In making the allowance to the administrator of \$17 28, for so much paid by him to *Samuel Brown, Jr.* for commission on money collected, we think the court erred in judgment. This collection, the administrator ought to have made himself, and should not have burthened the estate with the expense of it. The collector was not a public officer, by the usage of the country entitled to commissions, (if there be any such usage,) nor was resort had to legal process, or the intervention of an attorney at law, to compel the payment. In the last case the expense of the collection may be defrayed by the estate, and we observe that many expenditures of this kind were allowed in the last account passed by this administrator. While on the argument of this question, it was urged by the appellant's counsel, that the administrator's commission was improperly allowed by the court, on passing his second account, and that the allowance ought to have been deferred for the last or final ac-

count. This point is not within either of the three questions decided by the Orphans Court, and perhaps, in strictness, we have nothing to say to it. We have, however, no hesitation in declaring that we do not agree with the counsel on this subject. The Orphans Court have a limited discretion with regard to the amount of the administrator's commission, and no good reason can be assigned why they should not have a like discretion, as to the time and manner of making the allowance. Of course, they would aim to make the commission allowed correspond with the duties performed, and in passing every account, would look to the advance made by the administrator in the administration of the assets, in bestowing on him the reward of his services.

The sum lost by the insolvency of the *Shipleys*, we are of opinion, the court were right in passing to the credit of the administrator, in his last account. It amounted but to seventy-two dollars, and from aught that appears, *Edward Shipley* was fully competent to its discharge, when he entered into the bond with *Levy Shipley*, as his security for the payment of it. Nor was the administrator remiss in using ordinary diligence, for the recovery of this debt after it became due. At the next term but one thereafter, he instituted a suit for it, and in the due course of the courts, obtained a judgment, and issued a *fieri facias*. It was, therefore, not lost by his negligence, unless indeed, passing by one term of the court without suing, is to be taken as an evidence of it. Such strictness, we think, was not required of the administrator; and if this was once pronounced to be the law, we are assured that prudent men, and those most worthy of the office, would seldom be found engaged in the settlement of intestates' estates. Whenever an administrator manifestly intends fairly to do his duty, the rule should be not to hold him liable upon slight grounds.

The question upon the subject of interest is the most important one at present under the review of the court. It is worded thus: Whether or not the administrator should be charged with a larger sum for interest? Before it was sub-

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mitted to the Orphans Court, he had been charged with interest received on the bonds taken for property sold, and as little was said on the argument in relation to this fund, we supposed the appellant to have been satisfied with the adjustment made of it. In his petition, the appellant seems to have had another object in view. He appears to have been in quest of interest on all sums received and misapplied by the administrator, and this demand brings before us a point, now for the first time perhaps, to be settled in this State. It is, how far the Orphans Courts have the power to make an administrator account for interest on money belonging to the estate, which he has applied to his own use, or neglected to distribute and pay over? This is a familiar subject in equity as applied to trusts, and we see no well founded reason why the power should not be exercised in the Orphans Courts, and more especially, since the case of *Hall and Griffith*, decided in this court, (see 2 *Harr. and Johns.* 483,) where an administrator was made to account in the Orphans Court of *Harford* county, for the labor of negroes belonging to the estate of his intestate, which he employed in his own service, and for his own purposes. If this authority is with the Orphans Court of *Anne Arundel* county, a further inquiry is, whether it ought to have been exerted in calling this administrator to account for interest on the money of the estate he unreasonably held in his hands, or applied to his own use, and we clearly and decidedly think it ought. There is but little testimony in the case, and that little not very explicit; yet we are of opinion, there are sufficient grounds established on which to call *Roderick Dorsey* to account for some interest. Had he fully answered the demands of the petition, he would have disclosed the sums he received of the purchasers of the property, sold under the order of the court, and the periods at which they were respectively received; but as this is not done, there is evidence only in the case to make him account for interest, for a part of the \$1144 44½ he received at the time of the sale. We do not, with the counsel, blame him for receiving this

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money of the purchasers, who were prepared to pay, rather than give bond with security; for in this he was certainly right. The object of the Orphans Court, in ordering the sale of the property of the deceased, is to convert it into money as expeditiously as is consistent with an advantageous sale. All the benefits contemplated by a credit sale, were obtained by the administrator in this case, and, therefore, we sustain his conduct. But in this decision, we wish to be distinctly understood as confining it to sales made under the authority of the Orphans Court. His imputed fault is, in holding the money in his hands, or in applying it to his own purposes.

His second account was passed the 21st January, 1829, and his commission, disbursement, and other expenses, allowed to that time, amounted only to \$656 28½, which demonstrates that there remained in his hands for nearly two years, the sum of \$488 15¾. On this sum he ought to be held to account for interest, from the time he received it, if he applied it to his own use and profit, and from the end of thirteen months after the date of his letters, if he kept it by him without any apparent reason, and omitted to make distribution of it, as he ought to have done among the creditors. This they were entitled to have made within that time, by the act of 1798, *ch.* 101, *sub-ch.* 8, *sec.* 14, and if they were disappointed in the receipt of their dividends, by his culpable inattention to duty, it is but just that he should be charged with interest lost to them by his neglect. The order for the distribution on the 17th January, 1829, was not passed, as intimated, on the 8th of February preceding, and furnishes no excuse for the delay, and the controversy among the creditors was no impediment to it, as the administrator might have retained the disputed dividend, or a portion of it, under the direction of the Orphans Court.

The decision of the Orphans Court of *Anne Arundel* county in this case is reversed; and we direct the proceedings to be returned to that tribunal, that on the principles herein set forth, justice may be done to the parties.

DECREE REVERSED.

ZACHARIAH KEENE, vs. THOS. THOMPSON of BENNET.
December, 1832.

K had a judgment against B, upon which he sued out a *fi. fa.*, and placed it in the hands of the sheriff, who delivered it to the defendant, his deputy, to be levied and collected. B paid the defendant the amount of this judgment, and it was entered satisfied. The defendant then made a payment to K, but it appeared that one of the bank notes thus paid, was a counterfeit, and that the defendant had not received it from B. HELD, that the taking upon himself, to pay over to the plaintiff, the amount he had collected, placed the defendant in the attitude of one who had received money for another, and that, together with the circumstance of the judgment being entered satisfied, was evidence tending to show, that he was authorised by the sheriff to pay over the money to the plaintiff, from which the law raises an implied *assumpsit*. The defendant having received good money, was responsible for the whole amount.

APPEAL from Saint Marys County Court.

Assumpsit by the appellant against the appellee, commenced 20th August, 1828, for money had and received, and for money paid, laid out and expended. The general issue was pleaded.

1. At the trial the plaintiff having proved by the cashier of the bank, that the note for \$100, hereafter referred to, was a counterfeit, proved by a competent witness, that the same had been received by him of the defendant, as a payment of a *fieri facias* for a debt on judgment in Saint Marys County Court, in favor of the present plaintiff, against one *Gustavus Brown*; for the recovery of which judgment, a *fieri facias* had issued to (*William Williams*,) the then sheriff of said county, and placed in his hands, and by him delivered to the defendant, as his deputy, to be levied and collected by him, according to the precept therefor. And also proved, that the judgment was thereafter entered satisfied on the docket, as per receipt appears. He also proved by said *Brown*, that he had not paid to the said defendant the said hundred dollar note, but had paid him in other, and good money, and that his debt to *Keene* thus paid, amounted to about \$280. He further proved, that some time after

this note was discovered to be a counterfeit note, the plaintiff called on the defendant to give him good money, and take back the said hundred dollar note, to which defendant replied, that he had never paid over to plaintiff that particular note, and that he must get it as he could.

The defendant then prayed the court to instruct the jury, that if they found from the evidence, that the defendant acted as deputy sheriff to *William Williams*, the sheriff, in collecting and paying over said money so due from *Brown*, and that the same was known to the plaintiff, that then the plaintiff is not entitled to recover in the present action; which instruction the court (STEPHEN, Ch. J.,) gave. The plaintiff excepted, and the verdict and judgment being for the defendant, the plaintiff prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., EARLE, ARCHER, and DORSEY, J.

Brewer and Stonestreet, for the appellant.

1. An action for money received will lie against the sheriff who has received money in that character, for the use of another, and failed to pay it over. 2 *Saund. P. & Ev.* 213, 263. And a deputy sheriff is equally responsible in the same action upon the general rule, that this action will lie in every case, where one man has received money for the use of another, and withholds it. *Ib.* 209. But the action in fact, is against *Keene* in his individual capacity, and not as the sheriff's deputy; and they contended, that whatever might be said of his responsibility in the latter character, there could be no doubt of his individual liability, under the circumstances of this case.

V. H. Dorsey, for the appellee.

It appears from the evidence, that the defendant, in this transaction, acted as the sheriff's deputy, and it follows, therefore, that he is accountable only to his principal, and that the plaintiff's remedy, if he has any, is against that

principal. The deputy acts in the name of his principal, and the latter alone is known to the court. *Woodgate vs. Knatchbull*, 2 Term Rep. 156.

Though the deputy may have been guilty of misconduct, the sheriff is the proper and only party to be sued. *Cameron vs. Reynolds*, Cowper, 406. 1 Ch. Blk. Com. 345, (note.) *Hammond N. P.* 83, note 7. *Lane vs. Sir R. Cotton*, 12 Modern, 488. *Perkins vs. Smith*, 1 Wilson, 328. *Paddock vs. Cameron*, 8 Cowen, 212. *Draper vs. Arnold*, 12 Mass. Rep. 449. *McIntyre vs. Trumbull*, 7 Johns. Rep. 36. *Tuttle vs. Love*, *Ib.* 470.

BUCHANAN, Ch. J., delivered the opinion of the court.

This cause has been treated in argument, as if it was a suit against a deputy sheriff, as such, for money collected by him, on a *fieri facias* sued out upon a judgment of the plaintiff, and put into his hands by his principal, the sheriff, for the purpose of being levied; and the right of the plaintiff to recover, resisted, on the ground of a want of privity between a judgment creditor and a deputy sheriff, who has levied the money under an execution upon the judgment, and is responsible to the sheriff, his principal, for the faithful discharge of his duty, and not, as it is contended, to the creditor under whose judgment the execution has been levied; which may well be conceded without prejudice to the plaintiff's right to recover in this case.

The suit is not against the defendant as deputy sheriff, founded upon the mere fact of his having collected the money in dispute, under an execution sued out at the instance of the plaintiff, for which he would be answerable to his principal; and which, therefore, it may be granted, could not be recovered from him, in an action by the judgment creditor against him as deputy sheriff, for so much money made under the execution by him, in that character. But it is an action for money had and received, against him in his private individual capacity. The evidence, it is true, shows that the plaintiff, being a judgment creditor, sued out a *fi. fa.* upon his judgment, which was put into the hands of the

defendant, by his principal the sheriff, and that he levied the amount of the judgment as deputy sheriff; but it is also in proof, that he afterwards took upon himself to pay over to the plaintiff, the amount of the judgment so levied, and that the judgment was entered upon the docket satisfied.

The taking upon himself to pay over to the plaintiff the amount he had collected, placed him in the attitude of one who had received money for the use of another—and that, together with the circumstance of the judgment being entered upon the docket satisfied, is evidence tending to show, that he was authorised by the sheriff to pay over the money to the plaintiff; and that from the time he was so authorised, he held it in his hands for the use of the plaintiff, upon which the law raised an implied *assumpsit*; whereby he became responsible to the plaintiff, in an action for money had and received to his use.

The proof, as it appears in the record, is, that the money which came into the defendant's hands, was the whole of it good money, but that instead of paying over to the plaintiff like good money, which he was bound to do, there was among the money received by the plaintiff, one counterfeit hundred dollar note, which was not at the time known to be so by the plaintiff, but was received by him as a genuine bank note; which counterfeit note received by mistake, being not money, and a thing of no value, the delivery of it was not a payment to the plaintiff, and did not discharge the defendant from his liability to that amount; but if not since paid he is still answerable to the plaintiff for one hundred dollars, being so much remaining unpaid, of the amount that he held in his hands for the plaintiff's use, and which we think he is entitled to recover in this suit.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

THOMAS BERRY vs. SAMUEL HARPER.—December, 1832.

It is competent for the court to instruct the jury upon the sufficiency of the declaration in the cause, at the trial.

It is necessary to set out in the declaration a contract binding upon both parties, where the suit is instituted to recover damages for the non-performance of a contract.

A declaration which states an agreement with E (before her intermarriage with H,) and B, that E would sell to B a negro slave belonging to her, for the price of, &c. to be paid when B should be thereto requested, that they mutually promised to observe the said agreement, and that, in pursuance of it, the slave was delivered, shows a contract mutually binding.

Where the verdict was for the plaintiff, and upon the appeal of the defendant, the court reversed the judgment of the County Court, the granting of a *procedendo* depends entirely upon whether the plaintiff, from the facts disclosed by the record, could recover in a second trial. So where the writ was against husband and wife, and the facts proved by the plaintiff showed a cause of action against the husband alone, the court refused a *procedendo*.

An original writ cannot be amended, although subsequent proceedings founded upon it may.

APPEAL from Prince Georges County Court.

This was an action of *Assumpsit*, commenced by the appellant against the appellee, and *Elizabeth* his wife, formerly *Elizabeth Magruder*, on the 10th of March, 1831. The death of *Elizabeth* was suggested, whilst the cause was depending in the County Court.

The declaration alleged, that on the — day of —, in the year 1827, it was agreed between the plaintiff and *Elizabeth*, the wife of *Samuel*, while she was sole and unmarried, that the said *Elizabeth* would bargain and sell to the plaintiff a certain slave, her property, named *Jack*, for the sum of \$200, to be paid when the said plaintiff should be thereto afterwards requested; and the said agreement being so made as aforesaid, afterwards, to wit, &c. at, &c. in consideration that the said plaintiff had faithfully undertaken to the said *Elizabeth*, to do, observe, perform, and fulfil, the said agreement, in all things therein contained, on his part to be done, performed, and fulfilled, the said

Elizabeth undertook to the said plaintiff, and then and there faithfully promised to observe, do, perform, and fulfil the said agreement in all things, on her part and behalf, to be observed, done, performed, and fulfilled; and the said plaintiff in fact saith, that although the said *Elizabeth* afterwards, and after the making the said agreement, to wit, on, &c. at, &c. permitted the said plaintiff to take possession of the said slave, and although the said slave did continue and remain in the possession of the plaintiff for a long time, to wit, from the time of making the agreement aforesaid, until the 1st day of May, 1828, yet the said *Elizabeth* and the said *Samuel*, after their intermarriage, not further regarding the promise and undertaking of the said *Elizabeth*, so by her made as aforesaid, did not, and would not permit the said plaintiff to keep possession of the said slave, but took possession of the said slave themselves, and do continue, and hold possession thereof.

The defendant pleaded *non assumpsit*, and issue was joined.

At the trial the plaintiff offered in evidence, that on the 12th of April, 1827, he requested the witness to go to *Elizabeth Magruder*, and purchase of her the negro man in the declaration mentioned, then the property of the said *Elizabeth*, since married to the defendant, *Harper*, and authorised the witness, to offer the said *Elizabeth*, for the said negro, either the sum of \$250, or the highest price that could be obtained in the *Alexandria* market. The witness accordingly went to her residence, and made the offer as directed by the plaintiff, when she agreed to take the best price that could be obtained in the *Alexandria* market. The witness further proved that he was authorised by said *Elizabeth*, to ascertain the price in *Alexandria*, and when he ascertained it, (the negro then being in the *Alexandria* jail,) to take him out of jail, and deliver him to the plaintiff. That he went to *Alexandria*, for the purpose of ascertaining the price of said slave in that market, and that the highest price was \$200. That thereupon he took the

slave out of jail, carried him to the plaintiff, notified him of what he had been authorised to do by the said *Elizabeth*, and delivered him the slave. That the slave remained in the possession of the plaintiff until some time after the marriage of the defendants, *Elizabeth* and *Samuel*, when he was taken possession of by the said *Samuel*. The plaintiff further proved, that he had after the intermarriage aforesaid, tendered to the said *Samuel* the sum of two hundred dollars, being the price of the said slave, which he refused to accept.

The defendant thereupon prayed the court to instruct the jury, that the plaintiff was not entitled to recover, because, the declaration did not set forth a contract that was mutually binding on the parties to the same—which instruction the court gave. The plaintiff excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN Ch. J., and EARLE, MARTIN, ARCHER, and DORSEY, J.

Alexander, for the appellant, insisted.

1. The declaration does state a contract of mutual obligation. 2. It was not competent to give the jury any instruction whatever, upon the legal sufficiency of the declaration, during the trial of the issue of fact.

Stonestreet, for the appellee.

1. The action is rather for a *tort*, than *ex contractu*, but if on the contract, still the declaration shows no mutuality which is fatal. 1 *Chitty Pl.* 298. 2. But if the declaration is good in other respects, still the action cannot be maintained, because the breach is alleged to have taken place, after the marriage of the defendants, and the wife therefore, should not have been joined.

The objection was good upon a motion for a *non suit*. *Aldridge and Higdon vs. Turner*, 1 *Gill and Johns*. 429. 1 *Chitty Pl.* 298. *Turner vs. Walker*, 3 *Gill and Johns*. 377.

MARTIN, J., delivered the opinion of the court.

There is nothing in the objection, that it was not competent for the court to instruct the jury, upon the sufficiency of the declaration at the trial. This doctrine is clearly settled in *Chitty Pl. 293. Aldridge and Higdon vs. Turner, 1 Gill and Johns. 427.*

We think the court were wrong in the instructions they gave the jury. It is certainly necessary to set out in the declaration a contract binding on both parties, where a suit is instituted, to recover damages for the non-performance of the contract. But that is fully complied with in this case. The declaration states, that there was an agreement between *Elizabeth Magruder*, (before her intermarriage with *Samuel Harper*,) and *Thomas Berry*, that she would bargain and sell to the said *Berry*, a negro slave belonging to her, named *Jack*, for the price of two hundred dollars, to be paid when the said *Berry* should be thereto requested. That they mutually promised to observe the said agreement on their several parts, and that in pursuance of it, *Jack* was delivered to *Berry*. Where is the want of mutuality in the contract? *E. Magruder* sold and delivered *Jack* to *Berry*, and he in consideration thereof promised to pay the purchase money on demand. The judgment therefore must be reversed, and then the question is presented if a *procedendo* should be awarded. This depends entirely whether *Berry*, from the facts disclosed by the record, could recover in a second trial. *Turnpike Co. vs. Barnes, 6 Harr. and Johns. 61.*

This suit was brought against the husband and wife. The writ is joint, and if returned cannot be amended, although subsequent proceedings founded on it may. The declaration claims damages for the non performance of the contract made by *Elizabeth Magruder*, whilst she was sole, but the evidence produced by the plaintiff himself, shows a full performance of the contract on her part, by a delivery of *Jack* to him. If *Berry* has sustained an injury by the loss of his negro, his remedy is not on the contract, but must be

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sought against *Samuel Harper* alone, who, after his intermarriage with *Elizabeth Magruder*, tortiously took this negro out of the possession of *Berry*. This may be a good cause of action against *Harper*, but cannot subject his wife to a suit. An action against husband and wife cannot be sustained for a *tort* committed by the husband.

JUDGMENT REVERSED.

RICHARD B. DORSEY vs. STATE USE PANNELL.
December, 1832.

In an action upon a testamentary or an administration bond, by a creditor of the testator or intestate, it is necessary to allege a compliance with the provisions of the act of 1720, *ch. 24, sec. 2*.

The plaintiff must aver, and prove, a return of *non est inventus* on a *capias ad respondendum*, against the executor or administrator, by the sheriff of the county in which such executor or administrator lives; or a return of *nulla bona*, on a *fi. fa.* by the sheriff of the county in which the effects of the testator or intestate lie; or other apparent insolvency of the executor or administrator. And where the plaintiff relies upon the return of *non est*, &c. his cause of action should be alleged to be the same debt, for which the *capias ad respondendum*, stated in the declaration, was sued out to recover.

The allegation, that a writ of *ca. ad. res.* was sued out and returned in the county where it appeared from the proof the intestate lived, and letters were granted, and where in fact the administrator was sued upon the administration bond, will not suffice.

Upon a general demurrer, the court renders judgment against the party who commits the first error in pleading.

Where the County Court sustained a general demurrer to one of the defendant's pleas in bar, and the plaintiff obtained a verdict upon certain issues joined upon other pleas in bar, the court upon appeal, though the plea demurred to was defective, reversed the judgment of the County Court for error in the declaration; final judgment, however, was not rendered upon the demurrer, but a *procedendo* was awarded to re-hear the cause.

APPEAL from *Montgomery County Court*.

This was an action of *Debt*, brought by the appellant against the appellee, on the 27th January, 1830, on a bond

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executed by the appellant, as administrator of *William H. Dorsey*, deceased, dated 24th January, 1819, with *Clement Dorsey* and *R. E. Dorsey* as his sureties.

The declaration, after reciting the bond and its condition, (which is in the usual form of administration bonds,) averred, that that the deceased, on the 22d of June, 1818, executed his promissory note to *Pannell* for \$480, payable in six months from its date, whereby he became indebted to him in that amount; which, though frequently requested, he had in his life-time always refused to pay, nor hath the defendant, his administrator, since his death, paid the same, or any part thereof to the plaintiff, though often requested so to do. That after the death of the said *Wm. H. Dorsey*, and after the making of the writing obligatory aforesaid, by the said defendant, the plaintiff sued forth the writ of the State of *Maryland*, of *capias ad respondendum*, out of the County Court of *Montgomery County*, on the 26th October, 1829, against the said defendant, administrator of the said *Wm. H. Dorsey* deceased, whereby the sheriff of said county was commanded to take into his custody the body of the said defendant, administrator as aforesaid, if to be found in his bailiwick, &c. (reciting the writ.) That at the return day of said writ, the sheriff of said county returned, that the defendant, administrator as aforesaid, was not to be found in his bailiwick. And so the plaintiff says, that the defendant, as administrator as aforesaid, hath not in all respects discharged the duties of him required by law, as administrator as aforesaid, &c.

The defendant pleaded, 1. General performance. 2. *Non assumpsit*. 3. That the said defendant did not at any time within the three years, next before the day of impetrating the original writ in this cause, or the day of the impetration of the writ in the declaration mentioned, to which return was made of *non est inventus*, undertake or promise, in manner or form, as the said State hath complained, and this the said defendant is ready to verify.

Issue was joined on the plea of *non assumpsit*, and demurrers, in which the defendant joined, were filed to the first and third pleas.

The County Court ruled the demurrers good, and refused the defendant's prayer to amend the plea of limitations.

1. At the trial the plaintiff read in evidence to the jury the following promissory note, having proved the hand writing of the maker.

“*Brookville, Jan. 22d, 1818.*

\$480.—Six months after date I promise to pay *Edward Pannell*, or order, four hundred and eighty dollars, value received. *Wm. H. Dorsey.*”

The defendant objected to the admissibility of the same, under the plaintiff's declaration, as not corresponding with the note therein described. But the court, (DORSEY Ch. J., and KILGOUR, and WILKINSON, A. J.,) overruled the objection, and permitted the note to be read to the jury.

The defendant excepted, and the verdict and judgment being against him, he brought the present appeal.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, and ARCHER, J.

V. H. Dorsey, for the appellant, contended.

1. That the declaration is defective, in not alleging that it was for the recovery of the same money, for the recovery of which, the original *capias* issued. 2. It is defective also, in not averring that the defendant was a resident of *Montgomery* county. 3. There is no evidence that the drawer of the note was the defendant's intestate. He referred to the act of 1720, ch. 24. *Laidler vs. The State*, 2 *Harr. and Gill*, 277. *The State vs. Cox*, *Ib.* 382. 2 *Evan's Harr.* 181.

Gill, for the appellee.

1. All the proceedings took place in *Montgomery* county, and the legal inference consequently is, that *Dorsey*, the defendant, resided in that county. *Shivers vs. Wilson*, 5 *Harr. and Johns.* 132. There is nothing in the act of 1720 which makes an averment of residence necessary. It is

sufficient that the writ be sued out in the county, where the effects of the deceased are, and the law presumes they are, where administration was granted. The third section allows the whole subject to be given in evidence without any averment; and the several facts required to be proved, being more particularly within the knowledge of the defendant, less certainty in pleading is required. 1 *Chitty's Plead.* 177. *Iglehart vs. State, use of Mackubin*, 2 *Gill and Johns.* 235.

2. The record shows that the debt, upon which the *capias* was sued out, was due from *Dorsey* to *Pannell*, and no other debt is shown to exist. The debt now attempted to be recovered, could have been recovered under the first writ. The cause of action in both cases is the same to a common intent. 2 *Evans' Harris*, 183.

3. The proof that the note was in the hand writing of the intestate of the appellant, is sufficient evidence of identity. But this point is not raised by the exception.

Johnson, in reply.

The act of 1820, *ch.* 24, places the principal and surety in a testamentary or administration bond, on the same footing. They are both liable in the same way, and to the same extent. The law intended that the bond should not be sued until proceedings had been had, to recover the money from the administrator, or out of the effects of the deceased, or unless there was some apparent insolvency in the estate, or the administrator, and the *pleadings* must show the right to sue the bond. *Laidler vs. The State*, 2 *Harr. and Gill*, 277. A compliance with the act is a condition precedent which must be *averred*, as well as proved. The act says, that the *capias* shall issue in the county in which the administrator *resides*, and it is as necessary to aver the fact of *residence*, as the fact of issuing, and the forms are so. 2 *Evans' Harris*, 182. There is nothing in the declaration to show that the administrator resided in the county in which the *capias* issued, nor can it be inferred from the fact that the administration was granted there, re-

sidence not being a qualification to the obtaining of letters. Nor can such an inference be deduced from the fact of his being a resident of the county where the present action was commenced. But even if such inferences were legitimate, still the pleadings must contain the necessary averments. When an averment is essential, it must be stated expressly, or facts must be stated, from which the matter necessary to be averred, *must* be inferred. 1 *Chitty's Plead.* 228, 308, 315. *King vs. Horn, Cowper*, 683. Suppose the defendant had demurred to this declaration, it would have admitted nothing more than the *facts* alleged, or those which necessarily resulted from the positive averments. All the facts averred in this declaration might be true, compatibly with the non-residence of the defendant, at the time the *capias* issued. The third section of the act cannot aid the plaintiff, for the conditions prescribed by the first section must be complied with. In construing an administration bond, the court will regard it, as if the act of 1720, *ch.* 24, had been set out in the condition, and if that was done, the plaintiff would be bound to aver affirmatively, every fact essential to his right to sue. This principle was decided in the case of the *Union Bank vs. Ridgely*, 1 *Harr. and Gill*, 324. The proof cannot extend beyond the averment, and, consequently, if the plaintiff is right, he may recover without proving that the defendant resided in *Montgomery* county at the time the *capias* issued, which the act prescribes, as an indispensable pre-requisite to suing the bond. Upon looking to this declaration, *Dorsey* could not have known that an attempt would be made to prove that he resided in *Montgomery* county, when the *capias* issued. 2. It does not appear that the first suit was instituted to recover the same cause of action. The argument on the other side admits, that the former *capias* must have issued to recover the same debt, as that now sued for. And although it may be true, that the facts contained in the declaration might be sufficient *to prove* such an averment, yet that does not dispense with the averment itself. 3. There is not

sufficient evidence that the person who executed the note, and the intestate of the defendant, are the same parties.

BUCHANAN, Ch. J., delivered the opinion of the court.

This action was brought on an administration bond against *Richard H. Dorsey*, the appellant, (who is the administrator of *Wm. B. Dorsey*,) to recover the amount of a promissory note, given by the intestate, *William H. Dorsey*, to *Pannell* the appellee.

The appellant pleaded, 1st, general performance of the condition of the bond ; 2d, *non assumpsit* ; and 3d, the statute of limitations.

There were demurrers to the first and third pleas; and issue was joined on the second, at the trial of which, an objection was made by the appellant, to the admissibility of the promissory note, which was offered in evidence—and the court having overruled the objection, and permitted it to go to the jury, an exception was taken to the opinion of the court.

The only point raised in the argument here, on the bill of exceptions, is, that there is no evidence to show, that the maker of the note produced, was the appellant's intestate. But there is nothing in the objection. The note is signed by *Wm. H. Dorsey*, which (in the language of the statement,) was proved to be "the hand writing of the maker." If there was any other *Wm. H. Dorsey*, than the appellant's intestate, the appellant should have shown it; but that not appearing, proof that it was in the hand writing of *Wm. H. Dorsey*, was sufficient to show that the *maker* was the appellant's intestate. Looking however to the bill of exceptions, that would not seem to have been the point of objection below, but it appears to have been, that the note offered in evidence did not correspond with the note described in the declaration, which rests upon no better foundation.

The demurrers to the 1st and 2d pleas, were both sustained by the court, and it is conceded, properly sustained; but however defective these pleas may be,

as the demurrers according to the established rule, carry us up to the first fault, we are driven to look into the declaration, to see if there is a sufficient cause of action stated, to entitle the appellee to recover; or enough stated to have entitled him to sue the administration bond. Whatever is necessary to give a plaintiff a right to sue, must be averred in the declaration, and it is not sufficient to show it in evidence alone, as the recovery must always be upon the case made in the pleadings. By the act of 1720, *ch. 24, sec. 2*, it is provided, "that it shall not be lawful for any creditor or creditors, to prosecute any administration, or testamentary bond, for any debt or damages, due from, or recovered against any testator, or intestate, or their effects, before a *non est inventus* on a *capias ad respondendum*, be returned against the executor, or administrator, or a *fieri facias* returned *nulla bona*, by the sheriff of the county where such executor or administrator lives, or where the effects of such deceased lie, or such other apparent insolvency, or insufficiency of the person, or effects of such executor, or administrator, as shall, in the judgment of the provincial court that hears the cause, render such creditors remediless by any other reasonable means, save that of suing such bonds."

Thus then, before a creditor can be entitled to institute a suit upon a testamentary, or administration bond, for the recovery of any debt or damages, due from, or recovered against any testator, or intestate, or his effects, there must be a return of *non est inventus* on a *capias ad respondendum*, against the executor or administrator, by the sheriff of the county in which such executor or administrator lives; or a return of *nulla bona*, on a *fieri facias*, by the sheriff of the county in which the effects of the testator or intestate lie, or other apparent insolvency, &c. And as, to entitle a creditor to bring suit on a testamentary or administration bond, one or the other of the requisites must have occurred before the bringing of the suit, it is incumbent on the plaintiff to aver it in his declaration, otherwise, he does

not show that, which is a pre-requisite to his title to sue, and without which, he cannot be *rectus in curia*. It is just as necessary as an averment of performance of a condition precedent is, in a declaration in an action of covenant.

A plaintiff must in his declaration show himself entitled to sue, by showing that which alone gives the right, otherwise he does not show himself entitled to recover.

In this case there is no averment of the insolvency, &c. of the appellant, the administrator of *Wm. H. Dorsey*; no averment of a return of *nulla bona* on a *fieri facias*, by the sheriff of the county in which the effects of the intestate lie, nor is there the averment of the return of a *non est inventus*, on a *capias ad respondendum*, against the administrator of the intestate, *Wm. H. Dorsey*, by the sheriff of the county in which the administrator lived. There is indeed a statement of a return of *non est inventus* on a *capias ad respondendum*, against the appellant, the administrator of *Wm. H. Dorsey*, by the sheriff of *Montgomery* county, before the institution of this suit; but it is not stated that the administrator lived in *Montgomery* county. And for any thing alleged in the declaration, he might both at the time of suing out, and of the return of the *capias ad respondendum*, have been living in any other county in the State, or any where else. Nor is the debt which this suit was brought to recover, alleged to be the same debt for which the *capias ad respondendum* stated in the declaration was sued out. And neither of the pre-requisites of the act of assembly being averred, the appellee has not made such a case in his declaration, as entitles him to recover, no matter what the facts may be.

This question upon the construction of the act of 1720, *ch. 24*, is not now for the first time, brought before this court. In *Laidler's Adm'r vs. State use of Hawkins, 2 Harr. and Gill, 277*, it was decided, that in a suit by a creditor upon a testamentary bond, the proceedings should disclose a compliance with that act.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

Brown and Brown vs. Wallace and Mitchell.—1832.

MARY B. BROWN AND WILLIAM BROWN vs. WALLACE
AND MITCHELL.—*December, 1832.*

A decree directed a trustee appointed by the court "to sell such part of the property in the proceedings mentioned, as may be sufficient to pay the sum due from W M, to the heirs of J M." The decree contained the usual instructions as to the course and manner of the trustee's proceedings. The trustee divided the property into lots; and after having effected sales to the amount of the sum due as aforesaid, he exhibited an authority from such of the defendants in the cause as were of full age, which stated "we do hereby authorise and request the said W, trustee aforesaid, to sell the whole of the property mentioned in the said proceedings, on the same terms as is mentioned in the said decree, and authorise and request the Chancellor to ratify and confirm such sale when made by said trustee;" and then proceeded to make further sales at the same time and place. These facts were fully reported to the Chancellor, who ratified the sale. The purchaser of a lot, sold after the production of the aforesaid authority, gave his bond to W, as trustee, and took from him a receipt for the bond and an agreement to make a conveyance upon its payment, signed by W, as trustee. HELD, That the entire sale was effected by W in his character of trustee.

Whether a sale, made under the circumstances above mentioned, is voidable on account of the trustee having exceeded his authority, and whether he sold as trustee, are not questions open to investigation, after his report, fully disclosing the facts, had been finally ratified, and no appeal taken. These were questions necessarily brought to the Chancellor's attention by the report; and his final ratification was conclusive upon the purchaser.

Where a trustee of the court, at the time of sale, expressly declared he only sold the estate, right, and interest, which the parties to the decree had in certain land, and if they had no right he sold none, there can be no pretence of warranty; nor is it necessary in such a case, to determine whether the doctrine of *caveat emptor* applies to trustees' sales in this State.

At a trustee's sale a certain lot was represented as containing 143 acres, for which the purchaser bid \$23 per acre. This is a sale by the acre, and the purchaser applying to the court within a reasonable time, would be allowed for a deficiency in the number of acres. Where the sale was made in 1812, the purchaser gave his bond, took possession, and used the property, and made no complaint about deficiency until 1818, he was held to have forfeited all claim to an allowance.

The proceedings of a trustee for the sale of real estate, acting under the appointment and orders of the Court of Chancery, cannot be investigated by a bill, filed on the equity side of the County Courts. The relief due to a party injured by such a trustee, may be obtained upon application to the Court of Chancery, under whose exclusive control the trustee acts, and

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the County Courts, though courts of concurrent jurisdiction in equity matters, have no jurisdiction in such a case. The Court of Chancery cannot interfere by an original bill, where the trustee acts under the orders of the County Court.

It is a general rule as to sales under decrees of Chancery, that the purchaser always pays interest according to the terms of the decree from the day of sale, whether he gets possession or not. His getting possession is not a condition precedent to the payment of either principal or interest of the purchase money. The purchaser is presumed to regulate his bidding with a view to the known powers and rules of the court, as to delivering possession.

PER BLAND CHANCELLOR.

A purchaser at such sale, who does not give his bond for the purchase money, nor otherwise comply with the terms of sale, for several months after the sale, and did not receive possession until he complied, must still pay the interest from the day of sale.

IB.

A party to a suit after the court had decreed his land to be sold, cannot defeat the sale, or give a purchaser under the decree a right to object to his purchase, by making a conveyance to another person.

IB.

Where a trustee acting under a decree to sell as much property as may be necessary to discharge debts, due from A to B, sells more than is actually necessary, a purchaser cannot be allowed to object to the sale on that account.

IB.

In *Maryland*, the rule of *caveat emptor* applies to all judicial sales. Chancery in no case undertakes to sell any thing more than the title of the parties to the suit, and it allows of no inquiry into the title at the instance of the purchaser, or any one else.

IB.

A purchaser at a Chancery sale is not answerable for any disposition which the court may make of the purchase money.

IB.

APPEAL from the Court of Chancery.

The facts of this case are fully set forth in the opinion of the Chancellor, and of the judge by whom the opinion of this court was delivered.

BLAND, Chancellor, (March term, 1830.)

It appears that the late *James Mitchell* died intestate, and seized of sundry parcels of land, which descended to his six children, *Martha, Kent, Bennet, Harriet, James and Aquila*. That they instituted proceedings in *Harford County Court*, to have a partition made of these lands, and the estate having been found incapable of division, *William Mitchell* since deceased, to whom *Martin* had sold his in-

terest, in right of *Martin*, elected to take the whole, at the valuation. And the valuation not having been paid, *James Mitchell* and *Aquilla Mitchell*, two of the heirs of the late *James*, on the 23d May, 1811, filed their bill here, making all the heirs, and the administrator of the late *William Mitchell*, defendants. This bill brought no other parties before the court. The plaintiffs, upon the ground of their legal lien, under the act of 1786, *ch. 45, sec. 9*, prayed to have the land so held by the heirs of the late *William* sold to satisfy the amount of the valuation then due. The defendants answered, and on the 10th March, 1812, it was decreed, that “such part of the property in the proceedings mentioned be sold, as may be sufficient to pay the sum due from *William Mitchell* to the heirs of *James Mitchell*.” That *James Wallace* be appointed trustee to make the sale; and after proceeding in the usual form, the decree concludes in these words, “provided that the said trustee shall in the first place sell the part of the estate, clear of, and excluding the fishery, called *Cooley’s Fishery*, mentioned in the answer of *Parker Mitchell*, until the further order or decree of the court in the premises.”

The trustee under this decree made a full and particular report, as to the manner in which he had made the sale; among other things he says, that he had “caused said property to be laid off in lots, and sold as follows, to wit: lots nos. 1, 2, 3, 4 and 5, containing ten acres each, and lot no. 6, containing six acres, the said six lots being the whole of the tract called *Convenience*,” &c. &c. “Lot no. 11, part of a tract called *Rupulta*, and known by the name of *Gover’s Rupulta*, beginning for the same at the second boundary of the whole tract of land called *Rupulta*, and running thence S. 58 deg. W. 320 per. thence S. 16 $\frac{1}{4}$, E. 42 per. to the road leading from *Mrs. Dennison’s* to *Havre de Grace*, then binding on north-west side of said road, &c. &c. &c. until it intersects the N. by W. line of *Rupulta*; then binding on the said line to the beginning, and laid out for one hundred and forty-three acres,” &c. &c. That hav-

ing failed to sell on the 13th April, the first appointed day, he postponed the sale.

It appears, that on the 29th April, 1812, the heirs of the late *William Mitchell*, two of whom, *Edward* and *Ann*, are stated by the bill to be minors, and answered as such accordingly, by an instrument of writing purporting to have been signed by each one of them, except *Ann Mitchell*, say that “we do hereby authorise and request the said *James Wallace*, trustee aforesaid, to sell the whole of the property mentioned in the said proceedings, on the same terms as is mentioned in said decree, and we do hereby further authorise and request the honorable the Chancellor of *Maryland*, to ratify and confirm the said sale, when so as aforesaid made by the said trustee.

The trustee in his report then goes on to state, that on the 7th May, 1812, the day to which the sale had been postponed by him, he sold the several lots in succession, as numbered from one to eleven. He says that he “then offered for sale lot no. 11, and *Freeborn Brown* became the highest bidder, and purchaser thereof, by bidding therefor \$23 per acre, amounting in the whole to the sum of \$3289, and the said *Freeborn Brown* now refuses to give bond for the payment of the purchase money.” The said trustee further states, “that all the heirs of *William Mitchell*, and those with whom they have intermarried, except — *Mitchell*, who is a minor, having expressed a great desire that the whole of the property mentioned in the proceedings of their suit with the heirs of *James Mitchell*, except their interest in *Cooley’s* fishery, should be sold under the decree aforesaid; and the trustee foreseeing no inconvenience that could result, either to the heirs of *William Mitchell*, or the purchaser or purchasers of said property, in case the whole of the sales should not be ratified, did sell the whole of said property in the manner herein before stated.” These sales of this property after the usual notice by publication, were finally ratified and confirmed by an order passed on the 15th July, 1813. Some time after the trustee

had thus made his report of the sales, *Freeborn Brown* gave his bond, with *William Brown* as his surety for the payment of the purchase money; and *Freeborn Brown* was soon after put into the actual possession of lot no. 11, as the purchaser thereof, by the trustee.

As illustrative of the nature and terms of this contract made between the court and *Freeborn Brown*, as reported by the trustee, it is worthy of remark, that it appears from the proceedings, that after lots nos. 1, 2, and 3 had been sold, lots nos. 3, 5, and 6 were sold to *William Cole*, as parcels of the tract called *Convenience*. That some time after the sales had been ratified, *Cole*, by his petition, stated that he had purchased by the acre. That *Hughes*, the purchaser of lots nos. 1, 2, and 3, claimed a part of that which *Cole* had purchased. That it had been distinctly understood, at the time of the sale, between the trustee and the bidders, that a deduction should be made for deficiency; that he had given bond for the purchase money of the lot, supposing *the tract to contain fifty-six acres*; that it had since been found that *Hughes'* lots took away two acres from *Cole's*; and that he, *Cole*, being the last purchaser, the deficiency all fell on him, the other purchaser having his lots first laid off, and he, *Cole*, having *only agreed to take the residue*. *Prayer*, that a deduction on account of this deficiency, at the rate per acre at which the purchase was made. Upon this petition the trustee certified, that *at the sale* it had been suggested, that the *tract called Convenience* did not contain fifty-six acres; and therefore he had declared to the bidders, and persons present, that if that tract should be found so deficient, a deduction should be made from *the last sold lot of that tract*; and that so, the facts stated by *Cole* were correct. Upon which it was ordered, on the 22d February, 1814, that a deduction be made as prayed.

The auditor, in a report bearing date on the 17th June, 1814, among other things states, that the late *William Mitchell* was represented in the pleadings as a purchaser from *Martin Mitchell*, and also of one-half of *Bennet Mitch-*

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ell's share ; and that *Parker Mitchell*, a defendant, was the purchaser of the other half of *Bennet Mitchell's* portion, and the whole of *Kent Mitchell's* share, but that there was no proof of the purchase money having been paid for those shares. That *Martin, Bennet, and Kent*, three of the six heirs of the late *James Mitchell*, whose interest seems to be thus materially affected by these proceedings, had not been made parties to the suit, and he therefore "submits to the chancellor, whether they ought not in some shape to have notice of the complainants' application, and the allegations of the defendants." Upon which on the 22d July, 1815, it was "ordered, that the claims against the said estate (of the late *William Mitchell*,) which are now or may be exhibited, be decided on during the sitting of the ensuing July term, on application." And this order was directed to be published, and was published accordingly. After which the auditor, on the 27th February, 1816, made a statement of the distribution of the proceeds of sale, in which he has, as he had before reported, considered the late *William Mitchell*, and the defendant, *Parker Mitchell*, as the assignees of *Martin, Bennet and Kent*; and after having awarded to each of the other heirs of the late *James Mitchell* one-sixth of the valuation, has distributed the balance of the proceeds in equal portions, among the heirs of the late *William Mitchell*. Upon which, on the 29th February, 1816, the chancellor said, "notice having been given as directed by the order of 22d June, 1815, and no application having been made in support of the objections suggested in the first report, and the auditor having appropriated the proceeds by the within statement and report, the same are confirmed, and the proceeds are directed to be applied accordingly, with interest on the commission and dividends, in proportion as it has been, or may be received.

The bond given by *Freeborn Brown* for the purchase money having become due, and not having been fully paid, was put in suit by the trustee, *James Wallace*, in *Harford County Court*, and judgment obtained on it against *Free-*

born Brown, and his surety *William Brown*. From which an appeal was taken, and the judgment was affirmed in June, 1817; and on the 18th January, 1818, *Freeborn Brown*, as he alleges, paid a part of the debt. After which *Freeborn Brown* and *William Brown*, on the 8th May, 1818, filed their bill in *Harford County Court* against the trustee of this court, *James Wallace* alone, by which they prayed for, and obtained an injunction. On the 17th August, 1824, they filed their supplemental bill. On the 20th of the same month, *Kent Mitchell* was allowed to come in as a defendant. After which, on the 5th March, 1825, *Freeborn Brown* and *William Brown* filed another bill in *Harford County Court*, against this court's trustee, *James Wallace* alone. All these bills were answered, and the motion to dissolve the injunction was overruled. On the 13th March, 1826, *Freeborn Brown's* death was suggested, and *Mary B. Brown*, his executrix and devisee, was admitted as a plaintiff in his stead. After which these cases were removed to this court, and the proceedings all filed here, on the 8th May, 1827.

The parties having agreed that the two cases should be heard together and consolidated, and there being a convenience in having them so associated; and as it may prevent confusion, and save repetition, I shall therefore treat them as one suit; and that no equity, nor any real ground of relief may be lost to the purchaser, I shall consider all that is alleged in these several bills, as if it had been regularly introduced into the original case here by a petition, in which every thing stated in those bills had been fully set forth. And I shall then consider whether these bills, filed in a court of concurrent jurisdiction, ought not to be dismissed, even supposing they had presented a fit subject for equitable relief, because of their being incompatible with the proceedings of this court.

The first position assumed by the purchaser is, that he did not obtain possession until several months after the day of sale; and therefore, so much of the judgment against

him, as gives interest from that time, is against equity, and ought not to be allowed.

It is a general rule, as to sales under decrees of this court, that the purchaser always pays interest according to the terms of the decree, from the day of sale, whether he gets possession or not. His getting possession is in no case allowed to be a condition precedent, to the payment of either principal or interest of the purchase money. The purchaser is presumed to regulate his bidding, with a view to the known powers and rules of the court, as to delivering possession. There is, therefore, nothing in this objection, even supposing this purchaser himself to have been in no default; and by promptly giving his bond, to have clothed himself with an equity to demand a delivery of possession immediately after the sale had been finally ratified. But looking to his evasion or negligence, this objection comes with an ill grace from him. *Tyson vs. Hollingsworth*, 1808.

The next position assumed by this purchaser is, that because the heirs of the late *William Mitchell* have, since he bought, sold a part of the same land he purchased, to *Carvell* and *Charles Cooley*, by a deed dated on the 14th September, 1815, that therefore he should not be compelled to pay the purchase money.

Of this however there is no clear proof, but suppose the fact to be so, it would be strange indeed if any party to a suit, after the court had decreed his lands to be sold, should be able to defeat the sale, or could afford to the purchaser a sufficient reason for not paying the purchase money, by merely making a conveyance of the land to some third person, so as to give such third person a pretext of title, on which to bring suit against the purchaser from the court. It is clear, that the whole title of the heirs of the late *William Mitchell* to the lands embraced by the deed of the 14th September, 1815, was sold by the trustee; or that it was not. If it was sold, then the subsequent purchaser from those heirs, can have no title; and the title of the purchaser, under this court's decree, cannot in this respect be

impeached. If on the other hand, their title to the lands described in that deed was not sold by the trustee to *Free-born Brown*, then he has nothing to complain of, and the whole affair is entirely foreign to the matter now under consideration. This objection is therefore utterly groundless.

Another point upon which this purchaser rests is, that he bought by the acre, and that the trustee represented the tract which he, *Brown*, bought, called *Gover's Rupulta*, as containing one hundred and forty-three acres, when in truth it did not contain quite one hundred and twenty-seven acres; and therefore, that he ought to have a deduction to the amount of this deficiency. It is not alleged that the deficiency is in that part of the lot, which was the inducement to the purchase, or that it is of such a nature as materially to vary the contract. It is merely a claim for an allowance on account of short measure; as if by the terms of the contract, a measurement was absolutely necessary to reduce it to certainty, and to ascertain the amount of the purchase money to be paid.

The position here taken rests upon an assumption of fact, that the land was sold only by the acre; or in lots of an indefinite size, at twenty-three dollars an acre. But according to the trustee's report, such was not the fact; and there is no satisfactory proof that it was sold in any other manner, than as there stated. In the absence of all proof of mistake, misrepresentation, or fraud, the ratified report of the trustee is the only evidence of the contract by which the court can allow itself to be governed; and unless it be so impeached, it must be considered as conclusive upon the subject. It is stated by the trustee, that he caused the lands to be laid off in several distinct parcels, described by metes and bounds, and number of acres; and that he sold them in that manner; each parcel as a separate body of land, for an amount ascertained by the number of acres, said to be contained within the specified metes and bounds, and not by the acre alone; or in lots Nos. 1, 2, 3, &c. of an indefinite

size, without reference to boundary, or other more particular description, at so much by the acre, so as to render a measurement indispensably necessary, to ascertain the amount of the purchase money. That these several parcels of land were sold by the tract, and were distinctly understood to be sold in that manner by all the bidders present at the sale, is clearly shown by the explanations in relation to lot no. 6, which was sold by the acre, as a *residuum* of the tract called *Convenience*: but all the other lots, from no. 1 to no. 11, were sold by the tract; all of them lying within certain specified metes and bounds, made known to the bidders at the time of sale. After thus describing one of those lots, the number of acres is specified, with the usual reservation, "more or less," and lot no. 11, after being so described, is said to have been "laid out for one hundred and forty three acres;" and in each case the purchase money is summed up, and the purchaser is reported as having agreed to give a designated sum total. What is meant in general by the phrases, "more or less," or "laid out for so much," in conveyances of land, in reference to quantity, seems to remain as yet unsettled. The *Proprietary* instructions fixed it, as a rule for the land office, as to grants from the State, that they should be allowed to cover no more than ten per cent.; but there has been no rule established as to other grants, or conveyances. *Land. H. A.* 253. *Townshend vs. Stangroom*, 6 *Ves.* 340. *Winch vs. Winchester*, 1 *V. and B.* 375. 1 *Pow. Cont.* 375. *Anderson vs. Foulke*, 2 *H. and G.* 358.

There is, however, no direct and satisfactory proof of any deficiency in lot no. 11, as described and sold. It is not shown that the boundaries by which the trustee sold that lot, do not embrace the whole number of acres which they were said to contain. I am therefore of opinion, that this purchaser has failed to sustain this claim, for an allowance for deficiency; in the first place, because the land was sold to him by the tract, and not by the acre; and in the next place, because, in point of fact, he has thereon no deficiency within the designated boundaries.

This purchaser, *Freeborn Brown*, however, advances still further; he prays to have the whole sale rescinded, and to have so much of the purchase money as he has paid returned to him: and this he asks upon two grounds—first, that although the decree of the 10th of March, 1812, restrained the sale, to so much only as should be sufficient to satisfy the claims therein mentioned, yet the trustee made sale of the whole of the interest of the heirs of the late *William Mitchell*, by virtue of a pretended power, dated 29th April, 1812, from those heirs, to sell the whole, when in truth several of them were minors, and incompetent to give any such power to sell; and that the sale was ratified by the chancellor, under a mistaken impression that those heirs were of full age, and able to convey; so that this lot no. 11, was disposed of, which otherwise would not have been sold.

The position here assumed, is in direct opposition to the express terms of the decree; of the trustee's report; and of the instrument of the 29th of April, 1812. There is nothing upon the face of those documents, taken either separately or together, by which the position can be sustained. But *Freeborn Brown* must, in this respect, take upon himself one of two characters. He must stand either as a purchaser, under what he calls the power of the 29th April, 1812; or as a purchaser under the decree of this court. He cannot blend the two, and take advantage of both at the same time. If he bought under the power, then he is a purchaser direct from the heirs of the late *William Mitchell*, and this court has no jurisdiction of the matter in any way whatever, in this case. Those heirs in that respect, were not under the control of this court. They were entirely free to sell any right, or interest of theirs, as they might think fit, either in person, or by *James Wallace* as their attorney. But it is perfectly evident, that they could not, by giving a power of attorney to *James Wallace* to sell for them, who was also at the same time acting as the agent or trustee of this court, thereby mingle any of their separate

interests with that subject, with which the court was then dealing. They could not thus, uninvited, thrust their own individual interests into a cause, which was under the direction of the court for the benefit of others, as well as themselves. Therefore, in this view of the matter, the instrument of the 29th April, 1832, must be considered as entirely foreign to the matter under consideration. *Weems vs. Brewer*, 2 H. and G. 397.

If on the other hand, *Brown* takes his stand as a purchaser from the court, then on recurring to the decree, and trustee's report, it will be seen, that the decree covers the whole subject, and that the trustee has confined himself strictly within the limits of the decree. The bill had stated, that two of the heirs of the late *William Mitchell* were minors, and they had answered as such. The trustee had again incidentally reminded the chancellor, that one of them at least, was then a minor, in that part of his report in which he speaks of their desire to have all the land sold. After this it seems strange to object, that the chancellor had ratified the sale under a mistaken impression, that all those heirs were of full age. On the contrary, it is manifest from beginning to end, the chancellor was perfectly aware that he was dealing in the property of infants. There could have been no mistake in this particular. But it is said, that the instrument of the 29th April, 1812, induced the court to sanction the sale of the whole, which it otherwise would not have done. But the court had previously decreed the sale of the whole; and no more having been sold than was authorised by the decree, the ratification of the sale certainly could not be objected to on that account. It has long been the course of the court, to ratify sales at once, with the consent of all concerned; and the instrument of the 29th April, 1812, in reference to that practice, merely indicated that there would be no opposition to a ratification from those parties. But it is the daily habit of this court, for convenience, to carry to market, property which, in a subsequent part of the cause, perhaps it would have been unnecessary to sell.

Brown and Brown vs. Wallace and Mitchell.—1832.

Looking at its own powers of setting right the interests of all parties as among each other, the court often directs real estate to be sold, before it can know the real situation of the personal estate. And even supposing it to be true, that the instrument of the 29th April, 1812, had an influence upon the trustee, and the chancellor, in making, and in finally ratifying the sale, they were certainly right in thus consulting the convenience of the parties. And if in truth, more had been improperly sold than was absolutely necessary to meet the purposes of the suit; it is clear, that a purchaser cannot be allowed to come in, and object to the sale on that account. *Lloyd vs. Johnes*, 9 Ves. 65. *Lutwynch vs. Winford*, 2 Bro. C. C. 249. I am therefore of opinion, that the validity of this sale to *Freeborn Brown*, cannot be affected by any thing that has been shown on this ground.

This purchaser asks a rescision of the sale in the next place, upon the ground, that suits have been instituted in which it is alleged, and appears, that neither the late *James Mitchell*, the ancestor of the two plaintiffs, nor the late *William Mitchell*, the ancestor of the defendants, in the decree under which the land was sold, had any title to it; and that in one of those suits, an action of ejectment, a judgment had been rendered against the casual ejector, and *Freeborn Brown*, had been actually turned out of possession; and therefore, as the court cannot make to this purchaser a good title, he ought not to be compelled to pay the purchase money.

In *England*, it seems, that when lands are decreed to be sold, the court, in most instances, undertakes to sell a good title; and therefore it is common in such cases, to make a reference to a master, to see whether a good title can be made or not, to the purchaser, who will not be compelled to take a doubtful title. *Marlow vs. Smith*, 2 P. Will. 198. *Shaw vs. Wright*, 3 Ves. 22. *Coop. Rep.* 138. In *Maryland*, the course has always been different. Here, as to all judicial sales, the rule *caveat emptor* applies. *Ridgely vs.*

Gartrell, 3 H. and McH. 450. *The Monte Allegre*, 9 Wheat. 644. *Finley vs. Bank U. S.*, 11 Wheat. 307. The court in no case undertakes to sell any thing more, than the title of the parties to the suit; and consequently, it allows of no inquiry into the title, at the instance of a purchaser, or any one else. The court makes no warranty, of any kind, of the title sold by its trustee, and therefore cannot listen to any objections as to defect of title, or be involved in any inquiry into its validity. The operation of this general rule is, in many respects, mutually beneficial; for as on the one hand, the court, by selling only the title of the parties to the suit, and giving no warranty, involves itself in no expensive, dilatory, and troublesome inquiries, into the validity of the title; so on the other hand, the purchaser is not answerable for any irregularity of the court, nor for any disposition which it may make of the purchase money, and has a right to presume, that the court has acted correctly in decreeing a sale. But as the court offers, and he takes no more than the title of the parties to the suit, it is his duty to see, that all who have an interest in the property, and whose rights ought to be bound by the decree, have been made parties to the suit for that purpose; and have been so concluded by the decree under which he buys. And it is also necessary for the same reason, that the court sells only the right of the parties to the suit, that the purchaser should ascertain for himself, whether or not, the title of those parties may not be impeached, or superseded by some other and paramount title. For he has no right to call upon the court to protect him from a title not in issue in the cause, and no way affected by the decree. 2 *Belt. Supp. to Ves.* 101. 1 *Eden.* 19. *Gifford vs. Hoit*, 1 Scho. and Lef. 386. *Bennett vs. Hamill*, 2 Scho. and Lefr. 577. *Lloyd vs. Johnes*, 9 Ves. 65. *Curtis and Price*, 12 Ves. 105.

Here I might stop and pronounce a final decree, that these bills be dismissed. But as it has been urged that the *Harford County Court*, although clothed with power in all respects equal, and concurrent with this court, had in effect,

no jurisdiction of this matter; because it was merely a branch of a suit then depending here; and because the prosecution of these suits in that court thwarted, and was incompatible, with the regular progress of the suit here, embracing the same subject.

It is obviously necessary for the public good, that the several courts of justice of our system, should never allow themselves to be brought in collision with each other. And in general, they are so well ordered as to all matters of common law, that they cannot cross each other in any way whatever. Unfortunately however, the sphere of each one, having concurrent equity jurisdiction, has not been so well described as to prevent occasional interferences, even where there exists the most decided intention in each, to confine itself strictly within its own orbit.

Soon after I came here, I was made sensible of the necessity of great care, and vigilance, in order to steer clear of any collision with my co-ordinate neighbors; and yet have not been able to do so upon all occasions, because of the facts of the case not having been fully disclosed in the first instance. In a case, where the plaintiff merely represented, that he had become the debtor of the defendant by bond, on which judgment had been obtained at law, without giving him all the credits to which he was equitably entitled, I granted an injunction to stay the proceedings at law. But on its being clearly shown by the answer, that the plaintiff at law, was suing there on a bond he had taken as trustee, under a decree of a County Court of Equity, I not only dissolved the injunction, but dismissed the bill with costs, on the ground that the proceedings on the bond, were properly, a branch of a suit, depending in another court of equity, with whose movements this court ought not to intermeddle. But on another occasion, where I had passed a decree for the payment of a sum of money, and the party had sued out a *fieri facias*, a County Court granted an injunction to stop the further proceedings upon the *fieri facias*. In that case the collision was palpable and direct.

I determined however to submit; and without pressing the conflict, which could have been attended with no good effect, to leave the error to be corrected by the County Court itself. The recollection of these circumstances, has suggested the propriety of explaining my views upon this subject, more fully than might otherwise have been considered necessary.

It has been thought by some, that where any one court of competent authority, had in any manner expressed an opinion on a subject, every other court having no more than a concurrent jurisdiction, was thereby precluded from taking cognizance of the same matter. But it is believed, that the general rule is not so entirely comprehensive. It is certain that a judgment or decree, upon any matter put in issue between the same parties, in relation to the same subject, is a complete bar to any subsequent suit for the same matter.

So too, after a suit has been instituted, and is then depending in any court of competent jurisdiction in this State, though it is not so with regard to a suit in a foreign court, no other suit can be maintained for the same subject between the same parties. *Bowne vs. Joy*, 9 *Johns. Rep.* 221. *Walsh vs. Durkin*, 12 *Johns. Rep.* 99. And even if the one suit be brought in a court of common law, and the other in equity, to prevent so duplicate vexation, the Court of Chancery will put the plaintiff to his election, and compel him to abandon the one suit or the other. These rules can only apply where the parties and the subject are the same in both suits; but if there be any essential differences between the two, either as to parties or subject of controversy, as in the cases under consideration, other reasons and principles apply.

It has been said, that where an injunction had been refused by the chancellor, it could not be granted by a County Court, upon the same case, or the reverse. This opinion seems to be sufficiently well founded, if referred to a case in which the first bill is actually depending at the time,

when the second application is made to the co-ordinate court; or where, on hearing of the parties or by default, the one court has refused, or dissolved the injunction upon the same case, in which an injunction is asked for in the other court. Because if all that had been done in the one court, was to go for nothing in the other, a party might in every instance, as a matter of course, avail himself of all the delay to be had in the one court, and then take advantage of the identical same means of procrastination in the other court, after a solemn judgment had been pronounced upon his case, without resorting to the regular course of setting that judgment right. *Reynolds vs. Pitt*, 19 Ves. 138.

But an injunction is, in its effects and consequences, in many respects, analogous to a prohibition. The object of an injunction is to protect the citizen from harm, by acting upon the person complained of. The same object is in many instances, intended to be accomplished by a prohibition, which acts immediately upon the inferior tribunal; and yet the party may apply to each one of the superior courts in succession, for a prohibition, and his *ex parte* application having been refused by one, is of itself, no ground for its being rejected by any other of them. *Smart vs. Wolff*, 3 T. R. 340. *For. Rom.* 56. I therefore do not see why, upon the same principles, a citizen might not be allowed to take his chance by a first *ex parte* application, of obtaining an injunction from each one of the courts, having jurisdiction of his case, in like manner as he is allowed to apply to each one for a prohibition, without prejudice, from having been refused by another of them; particularly as the *Statute 4 Ann, ch. 16, sec. 22*, does not require an injunction bill to stay waste, or proceedings at law, to be filed before the *subpœna* is issued.

Under our government, the Federal courts, and the State courts have, in many instances, a concurrent jurisdiction; and either may have cognizance of the case, either as a court of common law, or of equity. If the plaintiff and the defendant be citizens of different states, the suit may be

brought in either; but if the suit be instituted in a State court, its proceedings will not be staid by an injunction from a Federal court, or the reverse, not because the court has not jurisdiction of such a subject between those parties, but because it could not exercise its jurisdiction in that case without bringing itself injuriously in conflict with another tribunal, with whom it ought not on any account to interfere. *Diggs and Keith vs. Wolcott*, 4 *Cran.* 179. *McKim vs. Voorhies*, 7 *Cran.* 279.

The two great co-ordinate courts of equity in *England* are, the high Court of Chancery, and the Court of *Exchequer*. The first is the prototype of this court. The *Exchequer*, as a phrase is, has two sides, it is a court of common law, as well as of equity. It is composed of a plurality of judges, and is in all respects *a term court*; being in these particulars essentially different from the Court of Chancery, which is composed of only one judge, and is most emphatically *always open*. The *Exchequer*, like our Federal Circuit Courts, and our State County Courts, is so organized that it can exercise scarcely any of its equity powers, except in term time; and owing to the delays, and expense of proceeding with its equity business, only from term to term, the continually open Chancery Court has a most decided advantage over the *Exchequer*, which on that account is almost deserted as a court of equity. *Crowley's case*, 2 *Swan.* 11. 1 *Lond. Jurist.* Art. 7. In this and other respects, the analogy between the high Court of Chancery, and the Court of *Exchequer* of *England*, as co-ordinate courts of equity, and the high Court of Chancery, and the County Courts of *Maryland*, as co-ordinate courts of the same description, is so close and striking, that the cases in relation to the conflicts of jurisdiction between those *English* courts, may be applied, as most instructive illustrations of the effect of any similar clashing, between our own co-ordinate courts of equity. It is a rule between those *English* courts, that where they have both an entirely concurrent jurisdiction of the same matter, that court is entitled to retain the

suit, in which it has been first commenced. There are some early instances of disputes between those tribunals, in which the one has issued its injunction against the officers of the other. But latterly, there is no instance, of either having enjoined a party from a proceeding in the other. That court in which the suit has been last instituted, or in which the proceedings are least comprehensive, and perfect, has in general given way to the other; or forced the parties to betake themselves to that court, in which the suit was first instituted, or where the most perfect proceedings are then depending. But after a bill to redeem a mortgage has been filed in one court, a bill to foreclose may be brought in the other—and a cross bill may be filed in Chancery, to an original bill in the *Exchequer*. And so too, either court will retain its suit, when the bill in the other has been dismissed. *Nelson*, 19. 1 *Vern.* 220. *Pre. Cha.* 547. *Amb.* 613. 3 *Desau.* 219. 3 *Swan.* 698. 1 *Jac. and W.* 232. 4 *Md.* 204. 6 *Md.* 115. But there is no instance to be met with, in which, either one of the *English* courts has even attempted to hinder, or stay any part of the proceedings in a suit, which had been rightfully instituted, and was then progressing in the other; as by enjoining a trustee proceeding in the direct execution of a decree; or staying a proceeding by execution to enforce the payment of money, decreed to be paid; nor has it been even intimated, that either of those courts would call before it the parties to a suit depending in the other, to give an account of acts done under the authority of the other; or to have the money, or property, with which the other was dealing, or which was in the hands of its officers or agents, brought in to be there disposed of by itself. Yet all this should have been considered, and adjudged, as settled and correct, as between those *English* courts, in order to sanction, by mere analogous authority, what appears by these proceedings to have been done by the County Court of *Harford*. From these proceedings it appears, that there never has been before that court, any defendant, who had in reality, any

thing more than a bare *pro forma* interest in the matter in controversy: for I put out of the question *Kent Mitchell*, of whom the plaintiffs made no complaint, and did not charge as a party. *James Wallace*, the defendant to these bills, was no more than an agent of this court, who might have been removed at its pleasure. He had no interest of his own in the matter. Had he been removed, there would then have been no one against whom that court could have proceeded with effect; or had he been permitted to remain, no decree against him alone, could have bound the rights of the real parties to the original controversy, who were no parties to the bills in *Harford County Court*. Had *James Wallace*, as trustee, collected any money, as the proceeds of the sale he made under the decree of this court, that court could no more have ordered it to be brought in, and paid over, than it could have taken money levied, and held officially by a sheriff of an adjacent county, under an execution from his own County Court; or money held officially, by the messenger, or register of this court. *Jaques vs. Gregg*, 1807. If *Harford County Court* could not have exercised powers to the whole of this extent, it is evident, that the bills which that court allowed to be filed, and required to be answered by *James Wallace*, the trustee of this court, should have been dismissed at once. Those proceedings are not only incompatible with, and calculated to cross, and thwart the proceedings of this court, but they were absolutely useless, and needlessly troublesome; because it is manifest that they could have resulted in no effectual relief; and because this court could have reached, in the most efficient manner, all the objects aimed at by these bills, much more expeditiously, and at far less expense. Of all this, had this case been brought to a final hearing before *Harford County Court*, I am satisfied, it might and would have been convinced, and upon that conviction, would without hesitation have dismissed these bills. And therefore, without revising, or reversing any thing which has been heretofore done by that court, I am of

opinion, that in consolidating, and dismissing these bills, I do no more than would have been done by that tribunal, as well upon the merits, as upon the ground of incompatibility of the proceedings, with the suit now depending in this court.

Whereupon it is, on this 5th day of July, 1830, adjudged, ordered, and decreed, that the said several bills of complaint, filed in *Harford County Court*, by the late *Freeborn Brown*, and the said *William Brown*, be, and the same are hereby consolidated, and treated as parts of the bill, filed on the 5th day of March, 1825, as if the same had been filed on the 8th day of May, 1818. And it is further adjudged, ordered, and decreed, that the injunction heretofore granted in this case, be, and the same is hereby dissolved, and that the bill of complaint of the said complainant, as herein before consolidated, be, and the same is hereby *dismissed with costs*.

From this decree, the complainants, *Mary B. Brown*, executor and devisee of *Freeborn Brown*, and *William Brown*, appealed to this court.

The cause came on to be argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Mayer, and *Kennedy* for the appellants, contended,

1st. That *Freeborn Brown* as purchaser at the sale made by *James Wallace*, trustee, was not obliged to take the title which the said *James Wallace* pretends to have offered: But on the contrary, the said *Freeborn* had good right to refuse to pay the purchase money, and accept such title, because:

1. The title to the said land was in dispute, and claimed by two branches of the *Gover* family, both of which branches had good pretensions to the said land, and one of whom, to wit, *Robert Gover*, actually recovered the said land by the neglect of the heirs of *William Mitchell* to defend it.

2. Because the said title was claimed by *Samuel Gover*, an original grantor of the said land, and who had filed pro-

ceedings in Chancery for a reconveyance of the same against the heirs of *William Mitchell*, in which proceedings it is affirmed, that the original conveyance of *Samuel Gover* was intended as a mortgage, and fraudulently drawn as an absolute deed, which proceedings were still pending in the Court of Chancery, and which, if true, would entirely defeat the title of the heirs of *William Mitchell*.

3. Because the heirs of *William Mitchell* themselves, (supposing there was no claim or right on the part of either of the *Gover* family,) had no other title to the land sold, except such as *William Mitchell* had, and which was nothing more than an equitable title in the land, derived from a contract to purchase of *Martin Mitchell*, (the eldest son of *James*,) his right of election under a statutory division of the land of *James Mitchell*, and for which no money was paid by the said *William Mitchell*. And that therefore the heirs of *William Mitchell* were not able to make a good legal title to *Freeborn Brown*.

4. Because a purchaser at a Chancery sale is not bound to accept a defective or doubtful title, as this is admitted by the chancellor's decree to be.

5. Because the part purchased by *Freeborn Brown* at the sale in the proceedings mentioned, was not sold in virtue of the decree, but by a private authority from certain heirs of *William Mitchell*, two of whom were minors, and incapable to give authority to sell, and that therefore, a *fortiori*, do all the above objections to defective title apply.

2d. That the chancellor erred in his judgment, where he said that his land was not sold by the acre, and therefore that *Freeborn Brown* was not entitled to a deduction on account of short computation.

3d. That the chancellor erred in deciding that *Freeborn Brown* was not entitled to have the contract rescinded, when it appeared that the *Mitchells* had subsequently sold some of the same land to the *Cooleys*, more especially as this sale to the *Cooleys* interfered with the right of *Free-*

born Brown to take possession to the water, where he had a valuable fishery.

4th. That the chancellor erred in not sending the controverted questions of location in this cause to be determined by a jury, his omission to do so being founded on an opinion, that the defendant in the cause was not answerable for any deficiency in the quantity of the land.

5th. That the chancellor's decree is altogether erroneous for dismissing the injunction in these causes, and for refusing the relief prayed.

On the *first* point they cited, 3 *Merr.* 53, 140, 248. 2 *Ves. and B.* 145, 149. 2 *P. Wms.* 201. 3 *Ves. Jr.* 22. 14 *Ves.* 205, 129. 17 *Ves.* 279. 16 *Ves.* 274. 8 *Ves.* 428. 5 *Ves.* 647. 1 *Des.* 382, 486. 4 *Des.* 126. 3 *Munf.* 317. 1 *Hopkins*, 436. 3 *Bibb.* 317. 6 *Harr. and Johns.* 258. 1 *Stark. Rep.* 65. 1 *Esp. Rep.* 115, 216. 1 *Bro. Ch. C.* 75, 148. 1 *Taunt.* 430. 4 *Ib.* 334. 4 *Johns. Ch. R.* 536. 2 *Johns. Rep.* 490.

On the *second*, they referred to 5 *Johns. Ch. C.* 180. 4 *Ib.* 85. 1 *Ves. Jr.* 210. 2 *Ves. Sr.* 100.

Gill, and *Alexander* for the appellees.

1. The bill states, that the title is defective in several respects, but as the title supposed to lie in *William Mitchell*, is not one of the grounds upon which the bill relies, the complainants are not at liberty to show any such defect by evidence, as the relief must be according to the case made by the bill.

2. The sale to *Brown*, the purchaser, was made by the trustee in virtue of the decree, and was warranted by it. The authority from the heirs of *William Mitchell*, does not profess to confer on him any independent power to act as their agent; but is nothing more than evidence of consent on their part, that a further sale to be made by him as a trustee, shall be ratified by the chancellor. The report of the trustee states this to have been the character of the instrument, and as the purchaser was a party to these proceed-

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ings, he is concluded by them, at least so far as not to be allowed to countervail them by parol. The bill moreover, is filed against *Wallace*, as trustee, and not against him and the heirs of *William Mitchell*, as it should have been, if he was regarded as merely their private agent.

3. But the sale being a judicial sale, the rule *caveat emptor* applies, and the purchaser is not entitled to relief, though he succeed in proving the title to be defective. 9 *Wheat.* 616. 2 *Harr. and Gill*, 358. If, however, the rule was the reverse in ordinary cases, the purchaser, under the circumstances of this case, would not be entitled to be relieved from his contract. He has slept upon rights, if he had any, for more than twelve years. He cannot therefore object, either to the supposed invalidity of the title, nor allege that the trustee exceeded his authority. The heirs would not, after such a lapse of time, be permitted to urge this objection to vacate the sale; neither can the purchaser, who has been in possession of the property during the whole period, using and cutting the timber, and consequently depreciating its value, for his own emolument.

A purchaser will not be allowed to say, that more property has been sold than was necessary to answer the purposes of the decree. 2 *Bro. Ch. C.* 248. 1 *Madd. Ch. Pr.* 443. 2 *Fonb.* 149. *Sug. Ven.* 35. Nor will an objection upon this ground be listened to, after the sale has been ratified. 1 *Ball. and Beat.* 501.

It has been said, that one of the parties was an infant at the time of sale. But if this were so, and the objection was a good one, it does not follow that the infancy continued until the period of the ratification. Chancery, however, can bind the rights of minors. *Powell vs. Powell*, 6 *Madd. Rep.* 41.

Cooley's fishery does not appear to have been sold, though if it was, as the chancellor had by the decree reserved the powers to do so, and his ratification is equivalent to an order for that purpose, the sale cannot be rescinded upon this ground.

Even in *England*, the Court of Chancery does not warrant the title, though it has it investigated by the master. 3 *Merr.* 223. 2 *Sch. and Lef.* 577. 1 *Madd.* 443. And there too, a purchaser may waive all objections to the title, which waiver may be inferred from circumstances; such as delay or acquiescence. *Sug. Vend.* 161. 2 *Madd. Ch. Pr.* 402. 2 *Merr.* 103. 2 *Cox.* 363. *Ib.* 394.

4. *Harford* County Court, as a Court of Equity, had no jurisdiction over the subject of this suit. The decree was originally in the Court of Chancery, and the proceedings in this case were transmitted from *Harford* County Court, under the act of 1824, *ch.* 196. The high Court of Chancery having jurisdiction over the subject of the controversy, before the application to the *Harford* equity jurisdiction, the latter had no power to interfere in the proceeding, at any stage of it; nor in any way to inquire into, or obstruct, the conduct of the officer appointed by this court. 1 *Pr. Wms.* 745. 2 *Peters' Cond. Ch. Rep.* 253. *Richardson vs. Jones*, 3 *Gill and Johns.* 163

MARTIN, J., delivered the opinion of the court.

The first question presented in the examination of this case, is to ascertain the true character of the sale made by *James Wallace* to *Freeborn Brown*, of the land in dispute, lot no. 11, part of a tract called "*Rupulta.*" Whether it was made by him in his character of trustee, under the decree of the Court of Chancery, or as agent for the heirs of *William Mitchell*.

It is stated in the bill, that this sale was made by *Wallace*, not in his character of trustee, but as the private agent of *Mitchell's* heirs, and this allegation is expressly denied by *Wallace* in his answer. He says he did not sell the land to *Brown* exclusively, in virtue of the power and authority given him by the heirs at law of *William Mitchell*, as stated by the complainants; but that he sold the same *under the decree of the Chancellor*. That although the decree directed him to sell so much of the real estate of *William*

Mitchell, deceased, as was necessary to pay the claim, or debt due to the heirs of *James Mitchell*, yet he never conceived himself to be restricted by said decree to the exact amount, particularly as it was impossible almost, that a sale could be made of such part of the lands as would just pay said claim, and no more. He avers, at the time of the said sale, he did not know how much the claims of the heirs of *James Mitchell* amounted to, nor did he know at that time, what the costs of the proceedings in the said suit, between the said *Mitchells*, and the costs for selling the said lands would amount to. He admits, at the time he sold the said land to the said *Brown*, he was under the impression, that he had sold as much, exclusive of the sale to the said *Brown*, as would pay the claim mentioned in the said decree, provided the other persons who had purchased the land sold by him, under the said decree, complied with the terms of sale which they had not done at the time he made the sale to *Brown*; but he denies, that he knew he had sold a sufficiency for the purposes of the decree, and states, that the power or authority derived from the heirs of *William Mitchell*, was obtained for the purpose of showing that they were satisfied with the sale, and not because he (*Wallace*) knew he had already sold a sufficiency for the purposes of the decree, and that he had no further power to sell.

This answer is responsive to the allegations in the bill, and must prevail of itself, unless defeated by the testimony of two witnesses, or one with pregnant circumstances. It does not however stand alone, but is powerfully supported by other evidence in the record. The language of the paper signed by the heirs of *Mitchell*, shows their intention, and their understanding of the transaction. After stating that the Court of Chancery had passed a decree, that such part of the property, as should be sufficient to pay the sum due the heirs of *James Mitchell*, should be sold in the manner, and on the terms maintained in said decree, and did appoint *James Wallace*, to make sale thereof; they say, being desirous that the whole of the property mentioned in

the proceedings, should be sold in the *same manner*, and on the same terms, as mentioned in said decree, they authorise and request the said *James Wallace*, trustee aforesaid, to sell the whole of the property, on the same terms as is mentioned in the said decree, and we do hereby further authorise and request the honorable the chancellor, *to ratify and confirm* the said sale when so made as aforesaid, by the said *trustee*. In every part of this writing *Wallace*, when referred to, is considered as acting as trustee; and not as the private agent of the heirs of *William Mitchell*; and in the last clause, it is expressly stated, the sale is to be made *by the said trustee*. If this was a private sale by the heirs of *William Wallace*, what control had the Chancellor over it, and upon what ground could he be called on to ratify and confirm the sale, unless made by a trustee, under his decree? Again, if this was a sale made by the heirs of *Mitchell*, by *Wallace* as their private agent, the bond for the purchase money ought to have been given *to them*, and not to *Wallace*, and when paid, the deed to the purchaser must be executed by the heirs, and not by their auctioneer. *Wallace* could only have authority to take the bond to himself, and when paid, to execute a deed, when the sale was made by him as trustee, under the decree of Chancery. By a reference to the receipt passed by *Wallace* to *Brown*, dated 16th November, 1812, we find, the bond for the purchase money was given to *Wallace*, and he obligates himself to execute a deed to the purchaser upon the payment of it. And this receipt is signed, "*James Wallace, trustee.*" This paper clearly imports, *Wallace* made the sale as trustee under the decree of Chancery, having first obtained the consent of *Mitchell's* heirs for so doing.

To oppose this answer on oath, so strongly corroborated by the acts of the parties themselves, appearing from the written evidence, is presented the testimony of some witnesses who were present at the sale. *Thomas Brown*, *Robert Gover*, and *Bennet Barnes* testify, that *Wallace* said

he sold it, by virtue of an authority from the *heirs of Mitchell*. *George Bartol*, *Andrew Rhodes*, and *Abraham Jarrett*, were also present at the sale. *Bartol* says, he does not recollect he heard *Wallace* say he had no authority to sell more. *Rhodes* did not hear him say he was authorised by the heirs to sell more, and *Jarrett* says, he does not recollect, *Wallace* said, under what authority he sold. This testimony is variant, and does not sustain any one statement of facts, and it must be recollected, this took place at the bustle of a public sale, and therefore, may not have been accurately remembered by persons not interested in the sale. But take the whole transaction together, may it not fairly be considered as supporting the statement, that appears from the written evidence before referred to. That *Wallace*, having sold lot no. 10, thought he had enough to pay the claim, but at the request of the heirs, and having obtained from them their assent in writing, he proceeded to sell lot no. 11, in the same manner as he had sold the other lots.

It has been contended, if the sale was made by *Wallace*, as trustee under the decree aforesaid, yet the sale was not binding on the purchaser, because he exceeded the power conferred on him by the decree. That by the decree, he was authorised to sell only so much land as was necessary to discharge the claim against the heirs of *William Mitchell*, and that therefore, after the sale of lot no. 10, if that produced a sufficient fund to discharge the claim, his power ceased, and the purchaser was not bound by the subsequent sale of lot no. 11.

This is not a new question, and will be found to be substantially settled in the case of *Lutwyche vs. Winford*, 2 Bro. Ch. R. 249. See also *Lloyd vs. Johns*. 9 Ves. 65. But we deem it unnecessary to enter into a full investigation of this doctrine, because neither *this question*, nor whether *Wallace* sold as trustee, are now open for inquiry. Upon the application to the chancellor to sell this land, for the payment of the debt due by *Mitchell's* heirs, he had

authority to direct the whole, or any part thereof, to be sold. He directed the trustee should sell so much as would be necessary to discharge the claim. The trustee, after the sale made a report of his proceedings to the Court of Chancery, in which he states the sale made to *Brown*, and the circumstances under which it was made. On the return of this report it was ratified *nisi*—public notice was given of this ratification, and no objections having been filed, it was about a year after its return *finally* ratified and confirmed. *Brown* having dealt with *Wallace* as trustee, and being reported the purchaser, if he wished to avoid the sale, because it was not made by *Wallace* as trustee, or that he had *exceeded* his authority, ought to have filed objections to the report. It is to be presumed, when the chancellor acted on this report, he was satisfied *Wallace* made the sale to *Brown* as trustee, and in a manner he was authorised *as such*, to make it. It was necessarily brought to his attention by the report itself, and his final ratification was conclusive upon the purchaser, *as to these questions*, he not having appealed from it.

Whether the opinion expressed by the chancellor, that a different course prevails in this State, from that adopted in *England*, as to the rule of *caveat emptor*, when applied to sales made by the trustees, under the decrees of the Court of Chancery, is correct, it is not necessary to decide in this case, because it clearly appears, the trustee at the time of sale expressly declared, he only sold the estate, right, and interest, which the *Mitchells* had in the said land, and if they had no right, he sold none. Here can be no pretence of warranty. *Brown* purchased the title of the *Mitchells*, be it what it might, and no more. This also disposes of the title set up by the *Govers*; in addition to which, the testimony shows, *Brown* was warned of their claim, and disregarded it. As to the objection urged in the argument, that the heirs of *Mitchell* had only an equitable title, the answer is, there is no such allegation in the bill, and therefore, not for the consideration of this

court. The same answer may be given to the defence, that *Wallace* sold all the residue of *Rupulta*. Although the complainants have attempted to prove it, they do not rely on it in their pleadings. The deed to the *Cooleys* cannot avail the appellants. If the land conveyed by it, was included within the lines of lot no. 11, as sold by the trustee in 1812, the deed in 1815 could not defeat *Brown's* title. If it was not included within these lines, *Brown* has no right to complain of it, because it does not interfere with the land he bought.

The sale made to *Brown* was not for a gross sum, but by the acre. Lot no. 11, was represented by the trustee as containing one hundred and forty-three acres, and *Brown* agreed to give twenty-three dollars for each acre it contained. If therefore, he was in a situation to inquire into it, and could prove a deficiency, it would have been allowed him. If he had desired a survey to ascertain this fact, he ought to have applied to the chancellor for it. The testimony relied on for this purpose, does not prove satisfactorily there was a deficiency. On the contrary, it appears a survey was made, to which *Brown* was privy, before he passed his bond, and it is to be presumed he was satisfied. *Brown* is not in a predicament to avail himself of the objections he relied on, had they been established. In *England*, where the purchaser is permitted to show a defective title, it is only on condition he makes his complaint in a reasonable time, and that he has performed every thing on his part to entitle him to the equitable interference of the court. Here the sale was made on the 7th day of May, 1812. *Brown* had been present at the running of the land. He was warned of the claim of the *Govers*. He afterwards gave his bond—a suit was brought on this bond, prosecuted to judgment, and carried to the Court of Appeals, yet he makes no complaint until May, 1818, holding possession of the property, using it as his own, renting it out, and cutting wood on it; and still he asks equity, *without any offer*

to pay for the use and profits of the land, or for the injury he had done to it.

We agree with the chancellor upon the subject of jurisdiction. The decree to sell this land was in the Court of Chancery. The trustee and fund were under the control of the chancellor, and he alone, could compel *Wallace* to bring the money into court, to be properly disposed of. 'Tis true, both courts in ordinary cases have authority to grant injunctions, but where a suit has been commenced in one, it ought to be entitled to retain it. Unless this rule prevails, it is impossible that the decrees of either court, in many cases, can be carried into effect.

DECREE AFFIRMED.

JOHN FREY vs. TIMOTHY KIRK.—*December, 1832.*

A citizen of *Maryland*, in 1816, gave his promissory note to a citizen of *Pennsylvania*, and made it payable at a banking house in the latter State. In 1818, the legislature of *Maryland*, by a special act, dispensing with some of the provisions of her general system of insolvency, authorised the maker of the note to obtain a discharge from his debts. HELD, that as this contract was to be performed in *Pennsylvania*, the insolvent laws of *Maryland* could not be pleaded in bar against it.

The insolvent laws of *Maryland* profess to operate upon all claims, whether the creditors are residents of other States or not, and no matter where the contracts are to be performed ; they are however, necessarily qualified by the constitution of the *United States*, and by the decisions of the Supreme Court of the *United States*, declaring the meaning and effect of that constitution.

Wherever this court can ascertain with certainty, the conclusions which the Supreme Court of the *United States* has reached in the exposition of the constitution of the *United States*, they will adopt them.

In conformity with this rule, the principles adopted by the Supreme Court, in the ultimate opinion of that court, pronounced in the case of *Ogden and Saunders*, 12 *Wheat.* 213, will be followed by the court.

The States possess the power to pass bankrupt laws ; but such laws, although constitutional in their action upon the rights of their own citizens, so far as they affect *posterior* contracts, are unconstitutional when they affect the rights of citizens of other States.

The constitutional rule is the same, whether the suit is brought in the *United States Court*, or in the court of the State where the debtor is sued, and by whose laws he is discharged.

The act of 1818, *ch.* 216, which repealed the exceptions or savings, in the act of limitations, (act of 1715, *ch.* 23,) in favor of persons beyond seas, is not unconstitutional as applied to causes of action existing prior to the time of its enactment; but after its passage, persons beyond seas had the same time to bring their actions, as they would have had, if they resided here, and their rights had accrued on the day of the passage of the law.

Every acknowledgment to take a case out of the act of limitations, should be of such a character, as that an implied promise may arise therefrom.

In an action upon a note, the defendant having pleaded limitations, it appeared that a few days before the commencement of the suit, the defendant was shown the note, and asked if it was his, to which he replied, "yes," and being then asked what arrangement he could make for its payment, replied, as regards that he could not say; being then informed that suit was to be brought, he again replied, "you may save yourself the trouble, as I have taken the benefit of the insolvent laws." **HELD**, that the admission with the qualification urged by the defendant, could not be construed into the admission of a present subsisting debt; if the excuse was true, it was equivalent to a declaration that the debt was discharged; and that it could not be inquired into upon this issue, whether the discharge actually obtained, was valid or not.

APPEAL from *Baltimore County Court*.

Assumpsit, by the appellee against the appellant, commenced on the 22d of March, 1828, on a promissory note dated 20th August, 1816, for \$213, of which the appellant was the drawer, payable to the appellee ninety days after the date thereof, at the Bank of *Chester county, Pennsylvania*.

The defendant pleaded, 1st. *Non assumpsit*. 2d. *Non assumpsit infra tres annos*. 3d. *Actio non*—and 4th. A discharge under the insolvent laws of *Maryland*, granted him in virtue of an act of Assembly, passed at December session, 1818, whereby the judges of *Cecil County Court* were authorised to grant him the benefit of the existing insolvent laws of the State of *Maryland*, without requiring the assent in writing of two-thirds of his creditors in amount.

Issues were joined upon the first *three* pleas, and to the 4th, the plaintiff replied, that the cause of action in the said

declaration mentioned, accrued to the plaintiff in the State of *Pennsylvania*, out of the jurisdiction of the State of *Maryland*, on the 20th of August, 1816, long before the passage of the act of Assembly referred to by the said defendant, and that at the time the said cause of action accrued to him the plaintiff, the plaintiff and defendant were residents and citizens of the State of *Pennsylvania*.

Issue was joined to this replication.

Errors in pleading on both sides were waived.

1. At the trial the plaintiff proved by a competent witness, that a few days previous to the institution of this suit, he called on the defendant, and showed him the note upon which the action is brought, and asked him if it was his note, to which the defendant, holding the note in his hands, replied "yes." The witness then told him the amount claimed, which he gave from a statement, which he (the witness,) held in his hand, and by which there appeared to be a balance due, including interest to the 6th February, 1828, of \$232 19. The witness asked him what arrangements he could make for the payment. Defendant replied, as regards that, he could not say. He was then asked by the witness, if the amount was due. Defendant said yes, and the witness understood the answer to refer to the statement, which however the witness did not show him. The witness, after some short time, informed the defendant that he had been instructed to bring suit, to which the defendant replied; "you may save yourself the trouble, or expense," (the witness does not recollect which,) "as I have taken the benefit of the insolvent laws."

The following agreement was then read in evidence by the plaintiff.

It is agreed that the act of Assembly referred to in the pleadings, for the relief of defendant, shall be read from the statute book, and the certificate of the clerk of *Cecil County Court*, showing the discharge of defendant, shall be sufficient evidence for that purpose. And it was admitted, that at the date of the note declared upon, the plaintiff was a citizen

of the State of *Pennsylvania*, and the defendant a citizen of the State of *Maryland*. It was further admitted, that the promissory note in the declaration mentioned was executed by the defendant in the State of *Maryland*, on the day it bears date, and at that time, and when it became due, the defendant was a citizen of *Maryland*, and the plaintiff was a resident of, and citizen of *Pennsylvania*. That after the execution of the note, it was endorsed over by the plaintiff to a third person, who placed it for collection in the bank of *Chester* county, in the State of *Pennsylvania*, where it was made payable. That it was subsequently paid by the plaintiff according to the custom of that bank.

The plaintiff then prayed the court to instruct the jury, *First*, that if the jury believe the testimony, the plea of limitations is no defence to the action, the same being sufficient for the jury to find an acknowledgment of the plaintiff's claim within three years before the institution of this suit.

Second, it being admitted that the plaintiff was a resident and citizen of *Pennsylvania*, at the time the note, the foundation of the action, was paid by the plaintiff, and at the time the cause of action accrued, and that the cause of action accrued before the passage of the act of 1818, *ch.* 216, and it not appearing by evidence, that the plaintiff has ever been in the State of *Maryland* since the said cause of action accrued, that the plea of limitations is no defence to the action, but that the act of 1818, *ch.* 216, so far as the same affects this claim, is unconstitutional and void. That the act of 1818, *ch.* 107, passed for the benefit of the defendant, being passed after the cause of action accrued, is unconstitutional, null, and void, and that the discharge granted the defendant by the judges of *Cecil* County Court, so far as the same operates to discharge the future acquisitions of the defendant, that is to say, his acquisitions subsequent to the date of his application for the benefit of the insolvent laws, is illegal and void, and that the plaintiff, if the jury shall believe that the defendant is indebted to the plaintiff, is entitled to a judgment for the amount due, sub-

ject only to the defendant's personal discharge, and that property acquired, or to be acquired by him thereafter, continues to be liable in the same way, as before his application.

Thirdly. That the plaintiff being a citizen of *Pennsylvania*, and the defendant of *Maryland*, when the note was given and the cause of action accrued, and said note being payable at the bank of *Chester* county, in the State of *Pennsylvania*, and notwithstanding the same was given in *Maryland*, the discharge, granted by the judges of *Cecil* County Court, operates legally and constitutionally only to release the person of the defendant, and does not operate to discharge his future acquisitions.

Fourthly. That the said note being payable in the State of *Pennsylvania*, and when the same was given and became due, the plaintiff and defendant, being citizens of, and residing in different States, and the act of 1818, *ch.* 107, having been passed after the cause of action accrued, the defendant's discharge only operates to release his person, and not property subsequently acquired by him.

Upon the preceding prayers, the court (HANSON, A. J.,) decided, that the evidence offered on the part of the plaintiff, was sufficient evidence of an acknowledgment to take the case out of the act of limitations, and if the jury believed the testimony, they must find for the plaintiff upon the plea of limitations; and that, as to the act of 1818, *ch.* 216, it had been held, that non-resident plaintiffs were barred by that act from bringing suits, unless brought within three years after its passage, and granted the first prayer of the plaintiff.

The same judge further decided, that the defendant's discharge only operated to discharge his person, and that property acquired by him since, must be responsible for his debts, and granted the second, third, and fourth prayers of the plaintiff.

The defendant excepted, and the verdict and judgment being against him, he brought the present appeal.

Frey vs. Kirk.

The cause was argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Johnson, for the appellant.

The suit not having been commenced within three years from the passage of the act of 1818, *ch. 216*, the remedy is gone, although it might not have been in the power of the legislature, to make the law applicable, immediately, to a contract between parties situated as these were, so as to bar it at once. Notwithstanding the law may not have been constitutional to the full extent contemplated by the legislature, still the court will enforce it, as far as its provisions are compatible with the constitution. *Eakin vs. Raub*, 12 *Serg. and Rawl.* 330. Limitations at all events, began to run from the date of the act of 1818. If this be not so, then contracts in existence prior to the original act of limitations are now in force, unaffected by that law. The acknowledgment relied upon to take the debt out of the act, was accompanied by a declaration, showing that it was not recognized as a present subsisting debt, and, consequently, the defendant was under no obligation to pay it. *Oliver vs. Gray*, 1 *Harr. and Gill*, 216.

When a party has been discharged under an insolvent law, nothing short of an *express promise* will revive the claim—a mere acknowledgment is not sufficient. The defendant may have been discharged under the act of 1805, and that law being in existence before, and at the time the contract was entered into, such a discharge would vacate it altogether. *Ogden vs. Saunders*, 12 *Wheat.* 213. Although the note on its face was payable in *Pennsylvania*, still in case of default, the *Maryland* courts were to enforce it.

R. W. Gill, for the appellee, contended,

That the plea of limitations was no defence under the circumstances of this case. It appears that a few days before the institution of this suit, the defendant admitted the note declared on to be his, and on being informed at the

same time, that suit was meditated, he replied to the witness, "you may save yourself the trouble, as I have taken the benefit of the insolvent laws." Now what is the effect of this admission? The defendant continually, from the time of making the note, to the trial of the suit, resided in *Maryland*. The note was payable to a resident of *Pennsylvania*, and made expressly payable at the *Chester Bank*, in that State. These admissions of a citizen of *Maryland*, are made with reference to his contract to be executed in *Pennsylvania*, and the inquiry is, do they sustain this defence? The effect of a defendant's admissions in reviving the remedy upon a contract, and waiving the bar arising from the act of limitations, was much considered in *Oliver vs. Gray*, 1 *Harr. and Gill*, 204, 217, and in *Keplinger vs. Griffith*, 2 *Gill and Johns*. 301. It was there held, that the acknowledgment of the debt with a refusal to pay, accompanied with an excuse for not paying, which, in itself, implies an admission that the debt remains due, and furnishes no real objection to the payment of it, is sufficient to take a case out of the statute. The excuse here is of that character. The note is admitted—actual payment is not pretended. The defendant's excuse is a discharge under the insolvent law; that is, an admission that the debt yet remains due in fact. Then, does the discharge furnish any real objection to the payment of the debt? Does it afford any moral or equitable ground for refusing to pay? In this case it does not. The only discharge which can be meant, is a discharge under the *Maryland* law. The defendant has always resided here. He could have no other. What is the effect of such a discharge upon this contract, which was to be executed in *Pennsylvania*? As it relates to that contract, and the rights of the present plaintiff dependent upon it, that discharge was clearly a nullity, void, and unconstitutional. When it is conceded, that the court will examine the legal effect of the excuse, as applied to the contract under consideration, and as that excuse furnishes evidence of a moral and equitable or legal ground for not paying, de-

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cide either for or against the party relying upon the statute; when these principles are considered, and applied to the excuse in this case, then it appears, that here the act of limitations is waived, and the remedy revived. *De Sobry vs. De Laistre*, 2 *Harr. and Johns*. 220, 224. *Zachary and Turner vs. Boyle*, 6 *Peters*, 634. *Ogden vs. Saunders*, 12 *Wheat*. 213. *Shaw vs. Robbins*, *Ib.* (no.) 369. *Sturgess vs. Crowninshield*, 4 *Wheat*. 201. That the plaintiff here is entitled to consider the actual situation of the defendant, the case of *Keplinger and Griffith* fully shows. If we pass from the consideration of the defendant's language, and situation, and consider the actual discharge granted, then as it was under an act passed after the date of the note, and dispensed with material portions of the general insolvent law of Maryland, there can be no doubt of its invalidity to affect the plaintiff. In the matter of *Wendell*, 19 *Johns*. 153.

Again, under our general act of limitations, and as the law stood when this note was given and became due, limitations did not apply to the plaintiff at all. He was a non-resident, and protected by the savings of the act. But by the act of 1818, *ch.* 216, these savings were repealed. The repeal of the savings in the act of limitations in relation to non-residents was prospective, and does not apply to this an antecedent cause of action; and if the language of the repealing law admits of a different construction, it then substantially becomes a law impairing the obligation of contracts, and is void. *Ogden vs. Saunders*, 12 *Wheat*. 261, 2, 3, 300, 301, 326, 327, 351, 352. *Ogden vs. Blackledge*, 2 *Cranch*. 272. *Eakin, et al. vs. Raub et al.*, 12 *Serg. and Rawl*. 330. *Elliott vs. Lyell*, 3 *Call* 241, 243. *Gillmore vs. Shorter*, 2 *Mod.* 310, 311. *Jones* 108. 2 *Showers* 17. 2 *Levinz* 227. *Ventris* 330.

Johnson, in reply.

The act of 1818, authorising the court to extend to the defendant the benefits of the insolvent laws, is not itself an insolvent law. It can with no more propriety be called so

than could a law creating a new tribunal for the administration of the existing system. By the act of 1805, the County Courts alone had jurisdiction in cases of insolvency; since then, jurisdiction in such cases, has been conferred upon the Orphans Courts, and special boards have been created, yet it has never been said that the discharges granted by each of these tribunals, have not been discharges under the act of 1805, and that they have not precisely the same effect as discharges by the County Courts. If the argument on the other side is sound, then every change in the mode of proceeding prescribed by the legislature, would be a new law, and would only operate on contracts thereafter to be made.

The act of 1818, repealing the savings in the act of limitations, was designed to operate on existing contracts to a certain extent. 12 *Serg. and Rawl.* 330, 344. It was the object of the legislature by that law to place the foreign creditor on an equality with the domestic; that is, to give them three years to sue in, and such a law is not unconstitutional, whatever might be said of a law, declaring subsisting contracts to be at once barred. *Sturgess and Crowninshield*, 4 *Wheat.* 201. These acts of limitations do not impair the obligation of contracts, they only concern the remedy. 12 *Wheat.* 352.

The proof offered by the plaintiff to take the case out of the act of limitations, is not sufficient for that purpose. It must be taken altogether, and part of it is, that the defendant had obtained a discharge from the debt, of which he intended to avail himself.

ARCHER, J., delivered the opinion of the court.

The following questions are presented by the various bills of exception in the record.

1st. Is the defendant's discharge under the insolvent laws of *Maryland*, a bar to the plaintiff's recovery of an absolute judgment?

2nd. Is the defendant protected by the statute of limitations? and if so, is the acknowledgment such as would be

sufficient to take the claim out of the operation of the statute?

In relation to the first question, the case presents the following facts. The contract was made between citizens of different States. The plaintiff resided in *Pennsylvania*, and the defendant in *Maryland*, and the contract which bears date in 1816, was payable in *Pennsylvania*, at the *Chester County Bank*. By the act of the general Assembly of *Maryland*, passed at December session, 1818, the benefit of the insolvent laws of *Maryland* was authorized to be extended to the defendant, without his obtaining the assent of two-thirds of his creditors.

We shall examine this question in two aspects. *First*, without any reference to the act of 1818, and looking solely at the ability of our laws to discharge the defendant from his contract, made subsequent to the passage of such laws; and *secondly*, as to the efficacy of the discharge in barring the recovery of the debt, contracted anterior to the passage of the special act of insolvency passed in the year 1818.

The insolvent laws of this State profess to operate upon all claims, whether, the creditors are residents of other States or not, and no matter where the contracts are to be performed; and if this cause were to be determined by our legislation solely, the plaintiff could not be entitled to any other than a *qualified* judgment.

The plaintiff, however, relies upon his rights as a citizen of another State, secured to him by the constitution of the *United States*, and contends, that however general may be the phraseology of our laws, they can have no operation upon his claim; and several decisions in the Supreme Court of the *United States* are relied upon to sustain this proposition. It has been a subject of great regret, that the determinations of the tribunal of the last resort upon this perplexing question, have been so unsatisfactory, and to use the language of one of the judges of the Supreme Court, that "they assume as much the shape of a compromise, as of a legal adjudication." But however we may lament this,

if it can be ascertained with certainty, the conclusions to which that court has arrived, as it is more especially its province to determine such questions, we shall feel ourselves constrained to yield to them the deference demanded by the peculiar sphere in which it moves, under the constitution and the laws.

Whatever doubt may heretofore have existed, with regard to the law settled in the cases of *Ogden and Saunders*, 12 *Wheat.* 213, and *Shaw and Robbins*, *Ib.* 369, arising from the diversified views taken by the judges in pronouncing their judgments, it appears by the late case of *Boyle vs. Zachary and Turner*, 6 *Peters S. C. R.* 634, that the ultimate opinion pronounced by *Mr. Justice Johnson*, is to be considered as final and conclusive of the law upon this subject, and *Chief Justice Marshall*, in 6 *Peters*, 348, declares, “that whatever principles are established in that opinion, are to be considered as no longer open for controversy, but the settled law of the court.”

Looking then, to the *ultimate* opinion of *Mr. Justice Johnson*, as giving the law upon this subject, and not considering it, as in any manner, to be limited or restrained in its interpretation, by his general views expressed in his first opinion in the same case, we consider, that so far as the question before us is to be affected by that judgment, the following principles are clearly deducible. 1st. That the *States* possess power to pass bankrupt laws. 2. That such laws, although constitutional in their action upon the rights of their own citizens, are unconstitutional when they affect the rights of citizens of other States. The case then before the court, presented the question, whether the discharge of a debtor under a State insolvent law, would be valid against a creditor or citizen of another State. The inferior tribunal had determined the invalidity of a discharge under such circumstances, and in affirming the judgment, the learned judge declares, the purport of the judgment to be this, “that as between citizens of the same State, a discharge of a bankrupt by the laws of that State, is valid as

it affects *posterior* contracts; that as against creditors, citizens of other States, it is invalid as to all contracts." And in speaking of the important results growing out of the limitation of the power of the States over contracts, to the controversies of their own citizens, after they become the subject exclusively of judicial cognizance, he declares, "that the States cannot proceed one step further without exercising a power incompatible with the acknowledged power of the other States, or of the *United States*, and with the rights of the citizens of the other States." Acting in conformity with this opinion, and the views of it thus expressed, the Supreme Court decided the case of *Boyle vs. Zachary and Turner*, 6 *Peters*, 635, in which it was adjudged, that a discharge under the insolvent laws of *Maryland*, was inefficacious in relieving the debtor from a contract to be performed in *Louisiana*. These determinations are decisive against the operation of the discharge here pleaded against the plaintiff's contract, as it was to be performed in *Pennsylvania*, unless as has been supposed, the opinion of the Supreme Court gives countenance to the idea, that there is a different constitutional rule operating in the *United States* Courts, and in the courts of the State where the debtor is sued, and by whose laws he is discharged.

Whatever may have been the views expressed by the learned judge, whose last opinion has become the law of the land, in his first opinion in *Ogden and Saunders*, we consider them as impliedly abandoned, or at least as not having been adopted by the court; for the views upon this subject in his first opinion, are not only not reiterated, but general conclusions are drawn, without the qualifications to which the first opinion would have led, and the last opinion is adopted by the court as the settled law. And if it were otherwise, we should feel some difficulty in sanctioning the doctrine, that a creditor, by pursuing his debtor by suit in the courts of the State granting the discharge, thereby stripped himself of any rights secured to him by the constitution of the *United States*, or in any manner

waived them. Entertaining these views, we are compelled to decide, that the defendant's discharge did not protect him against an absolute judgment.

This determination renders it unnecessary to present any views, in relation to the operation of the special act of insolvency, passed for the defendant's release in the year 1818, subsequent to the date of the contract, and dispensing with the assent of creditors.

The next question submitted by the various prayers in the record is, whether the cause of action is barred by the statute of limitations?

The act of 1715, *ch.* 23, gave, by its third section, to persons beyond the seas at the time of the accrual of the cause of action, liberty to bring their actions within the respective times prescribed by the second section, after their coming within the State. The act of 1818, *ch.* 216, repealed the exceptions or savings in this statute in favor of persons beyond seas.

If this repealing statute is unconstitutional, the plaintiff's claim, standing under the exception in the law of 1715, would not be barred by limitations, as there is no evidence in the record, that the plaintiff had been at any time within the State, from the formation of the contract, or at its accrual.

This cannot now be considered as an open question in this court. The constitutionality of the repealing law, was determined at the last June term, in the case of the *State use of Krenkel vs. Hoppe and Hammer*, in which the court adjudged, that after the repealing law, all persons beyond seas had the same time to bring their actions, as they would have had, if they had resided here, and the causes of action had accrued on the day of the passage of the law—and they gave such an interpretation to the act, as placed all suitors, foreign and domestic, upon the same footing. The unlimited latitude granted to persons beyond seas, was considered by

the legislature as unreasonable, and it could constitute no actual grievance, or just cause of complaint, if they were reduced to the same standard as our own citizens. Placing such a construction upon the act of 1818, it was clearly, neither a violation of any constitutional obligations of the State, for no obligation of contract was at all violated or impaired; nor was it an infringement of any principle of natural justice, as affecting the foreign creditor, for the same law governed his contract, which operated on all other contracts.

More than three years having elapsed after the passage of the law of 1818, *ch.* 216, before the institution of the suit, the statutory bar of limitations defeated the plaintiff's recovery, unless the evidence adduced by him shall be deemed sufficient to remove the bar and of this, we shall now inquire.

The evidence on this branch of the case is detailed in the bill of exceptions. It is unnecessary to advert to it here with particularity. In substance it is an admission that the cause of action was unpaid, and a refusal to pay, because the defendant was discharged by the insolvent laws.

Every acknowledgment to take a case out of the statute, should be of such a character, as that an implied promise may arise therefrom. It should therefore, in the language of *Oliver and Gray*, be the admission of a present subsisting debt. And although it was admitted in effect, that the debt was unpaid, the defendant relies upon his discharge under the insolvent law, to prevent its coercive payment. Taking the admission with the qualification which he has urged, it could not be construed into the admission of a present subsisting debt, for, if the excuse were true, instead of its being the admission of a present subsisting debt, it would be equivalent to a declaration that the debt was discharged. It is true, the admission is accompanied with an excuse, that leaves the moral obligation to pay in full force, yet taken altogether, it wants the essential ingredient demanded in *Oli-*

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ver and Gray; it is not the admission of a subsisting debt, but a denial of its existence as such.

Nor can it be answered, that the discharge was unconstitutional and void, and be inferred from this, that the admission was therefore of a subsisting debt; for the acknowledgment must be taken altogether, and no evidence can be received, to turn what is a denial of an existing liability, into the acknowledgement of a debt, by showing, that he either was not discharged by the insolvent laws, or that his discharge was inefficacious.

From the preceding views, it follows, that the court below were right in granting the *third* and *fourth* prayers in the first bill of exceptions, but were in error in granting the *first* prayer in said bill of exceptions; and were also in error in granting the *second* prayer therein contained, because, although the discharge of *Frey* under the insolvent laws, was inoperative as regards the plaintiff's claim, yet the court went too far in their instruction to the jury, if they believed the defendant was indebted to the plaintiff, that therefore the plaintiff was entitled to recover.

The court below were in error in the opinion by them expressed, and in the direction by them given in the *second* bill of exceptions. It also follows, that the court were right in rejecting the prayer made by the defendant's counsel in the *fourth* bill of exceptions, and in the opinion expressed by them therein.

JUDGMENT REVERSED.

RULE OF COURT.—*December, 1832.*

ORDERED, by the court, that no writ of *habere facias possessionem* will be issued by this court, under the act of 1825, *ch. 103*, unless an affidavit be filed, stating that the debtor, or some person holding under such debtor, by title subsequent to the judgment or decree, hath on demand

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failed or refused to deliver possession of the lands sold ; upon the filing of which affidavit with the clerk, he shall lay a rule on the person in possession, to show cause within the first four days of the term succeeding the term to which the process of execution was returnable, why the writ of *habere facias possessionem* should not issue ; and should the said rule be served upon the party in possession, twenty days before the first day of the term next succeeding the term to which the process of execution was returnable, and should no cause be shown within the said first four days of said succeeding term, the purchaser may take his writ as a matter of course, and no cause will be permitted to be shown after the lapse of the said four days.

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APPEAL.

1. The refusal of the County Court to compel an unwilling witness to answer a question, though erroneous, will not affect the judgment of the Appellate Court, where the answer to the question would be irrelevant or inadmissible. *Naylor vs. Semmes*, - - - - - 273
2. Where a prayer necessarily raises a point in the County Court, it will be reviewed in this court, under the act of 1825, though under the state of the pleadings, the point ought not to have arisen at all. *Edelin vs. The State*, - - - - - 277
3. Where a plaintiff sued out a writ in debt for £5000, and afterwards, by permission of the County Court, amended his writ to debt for £1500, the defendant pleaded limitations in bar, and had judgment of the County Court upon general demurrer. Upon appeal, the judgment was reversed, but as a writ cannot be amended, and the plea of limitations would be a conclusive answer to an amended declaration conforming to the original writ, this court refused a *procedendo*. *State use of Johnson vs. Green*, 381
4. When the court believe the plaintiff can recover nothing, they will not award a *procedendo*, though they reverse the judgment of the County Court rendered in favor of the defendant. *Morgan vs. Morgan*, 395
5. The act of 1825, ch. 117, does not apply either to demurrers or motions in arrest of judgment. *Charlotte Hall School vs. Greenwell*, 407

6. When a defendant takes a bill of exception, and afterwards succeeds in a motion in arrest of judgment, he has no ground of appeal; yet if the plaintiff appeals, and the court reverses the decision upon the motion, if it is perceived that the County Court has erred upon the bill of exceptions, a *procedendo* will be awarded, and when the County Court enters a final judgment, the defendant will be entitled to his appeal. *Charlotte Hall School vs. Greenwell*, - - - - - 407
7. Where the verdict was for the plaintiff, and upon the appeal of the defendant the court reversed the judgment of the County Court, the granting of a *procedendo* depends entirely upon whether the plaintiff, from the facts disclosed by the record, could recover in a second trial. So where the writ was against husband and wife, and the facts proved by the plaintiff showed a cause of action against the husband alone, the court refused a *procedendo*. *Berry vs. Harper*, - - - - - 467
8. Where the County Court sustained a general demurrer to one of the defendant's pleas in bar, and the plaintiff obtained a verdict upon certain issues joined upon other pleas in bar, the court upon appeal, though the plea demurred to was defective, reversed the judgment of the County Court for error in the declaration; final judgment, however, was not rendered upon the demurrer, but a *procedendo* was awarded to re-hear the cause. *Dorsey vs. The State use of Pannell*, 471

APPLICATION OF PAYMENTS.

1. On the 25th of October, 1820, M, of Baltimore, sold L, of *Havre de Grace, Md.*, merchandise to the amount of \$395 89, at 6 months credit. On the 3d of January, 1821, L made further purchases from M, to the amount of \$552 97, at 4 mos. credit, which last sum was guaranteed by D. On the 5th of May, M notified D that his guaranty was due, and, on the 7th, M drew upon L for the amount of the first purchase. On the 8th, L advised M that he could not pay this draft, and wrote he presumed "before it becomes payable you will be paid the amount of it, having directed A to pay D the amount of the *first* invoice, to pay over to you. We wrote D to this effect: in two or three days he (A) or Mr. D will call and pay the amount of your draft." On the 10th, D paid M \$400, for which the latter gave a receipt, viz. "received of L through D, on account," &c. On the 16th June, D paid M \$400, for which he gave another receipt, viz. "received of D for account of L," &c. The transactions between M and L were conducted by agents, who deposed at the trial, that the payments in 1821 were handed to D to be applied for his security and relieve him. In an action upon this guaranty *it was held*, that if the jury believed that when the first payment of the 10th May was made, M had received L's letter of the 8th, then M was bound to apply that payment in discharge of the purchase, unless L before the payment gave different directions, or M had reason to believe he intended a different application. *Mitchell vs. Dall*, - - - - - 361
2. It is a general rule, that a debtor on different accounts, may, when he makes a payment, apply it to which account he pleases; but, if he does not at the time of payment apply it specifically to either, but makes it generally, or on account, the creditor who receives it, may apply it to which account he pleases. *Ib.*
3. The application of a payment need not be expressly directed at the time by the party paying the money, but his intention may be inferred from the circumstances of the particular case. - - - *Ib.*
4. The mere fact that a payment was made to a creditor, having several demands upon the same debtor, with the debtor's money, through one who was the security of the debtor for one of the debts, is not a circumstance from which any inference can arise, that the debtor intended it should be applied to the debt of which such agent was the guaranty. - - - - - *Ib.*
5. A purchaser at a chancery sale is not answerable for any disposition which the court may make of the purchase money. *PER BLAND, CHAN'R. Brown and Brown vs. Wallace and Mitchell*, - - - 479

ARREST OF JUDGMENT.

1. Upon a motion in arrest of judgment, no reasons need be assigned. That motion serves in some measure, the office of a demurrer, and brings the whole record to the view of the court. *Charlotte Hall School vs. Greenwell*, - - - - 407
2. Upon a successful motion in arrest of judgment, each party pays his own costs. *Charlotte Hall School vs. Greenwell*, - - - - 407
3. Under the act of 1729, *ch. 24, sec. 17*, administrators in certain cases are directed to pay, and satisfy the balance of the estate of those intestate persons who leave no legal representatives, &c. "to the visitors of the public school of the county where the deceased resided." The replication in assigning a breach under that act, alleged, that the intestate "K, died possessed of a large personal estate in *Saint Marys* county." HELD, That although this allegation was ambiguous, yet it was sufficient upon a motion in arrest of judgment. *Ib.*

See Appeal, 5.

— Slander, 3.

ASSIGNEE.

See Corporation, 6.

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ASSUMPSIT.

K had a judgment against B, upon which he sued out a *fi. fa.*, and placed it in the hands of the sheriff, who delivered it to the defendant, his deputy, to be levied and collected. B paid the defendant the amount of this judgment, and it was entered satisfied. The defendant then made a payment to K, but it appeared that one of the bank notes thus paid, was a counterfeit, and that the defendant had not received it from B. HELD, that the taking upon himself to pay over to the plaintiff the amount he had collected, placed the defendant in the attitude of one who had received money for another, and that, together with the circumstance of the judgment being entered satisfied, was evidence tending to show, that he was authorised by the sheriff to pay over the money to the plaintiff, from which the law raises an implied *assumpsit*. The defendant hav-

ing received good money, was responsible for the whole amount.
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BOND.

1. Where the defendant, in an action at law, gave a bond reciting his intention to obtain an injunction to stay further proceedings, and conditioned to perform such order or decree as the *Court of Chancery* should pass in the premises, &c. if afterwards, he in fact obtains an injunction from a *County Court*, sitting as a Court of Equity, a failure to perform the decrees or orders of the County Court, will not give the other party a right of action upon such bond, although it was approved by the judge of the County Court who granted the injunction, and filed in the injunction cause. *Morgan vs. Morgan*, 395
 2. In an action upon a testamentary or administration bond, by a creditor of the testator or intestate, it is necessary to allege a compliance with the provisions of the Act of 1720, *ch. 24, sec. 2*. *Dorsey vs. The State use of Pannell*, 471
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CESTUI QUE TRUST.

Where a cestui que trust has notice that a fund in the hands of his trustee is sued for by a third person, he may participate in the defence of the action, and is barred

by a judgment adverse to his interests. *Charlotte Hall School vs. Greenwell*, - - - - - 407

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— Pleas and Pleading, 13.

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See Corporation.

COMPOSITION DEED.

See Evidence, 6.

— Fraud, 1.

COMPUTATION OF KINDRED.

The mode of ascertaining the degree of kindred between two individuals, according to the act of 1798, *ch.* 101, *sub-ch.* 11, *sec.* 15, is to reckon by counting down from the common ancestor to the more remote. This applies to all cases of distribution of personal estate. *Charlotte Hall School vs. Greenwell*, 407

CONDEMNATION OF PRIVATE PROPERTY FOR PUBLIC USE.

See Construction, 4.

— Corporation, 1, 19, 20.

CONDITION SUBSEQUENT.

See Estates upon condition, 1.

— Quo Warranto, 1.

CONSTITUTIONAL LAW.

1. The charter of the *Potomac Company* was a contract between the States of *Maryland* and *Virginia*, and that Company, the obligations of which could not, without the assent of the corporation, be impaired by any act of the legislature of either of the States, nor by the concurrent acts of both, consistently with that section of the constitution of the *United States*, which declares that "no State shall pass any law impairing the obligation of contracts." *Canal Company vs. Rail Road Company*, - - - - - 1
2. There is no difference in principle, between a law that in terms impairs the obligation of a contract, and one that produces the same effect in the construction and practical execution of it; both are repugnant to the constitution of the *United States*, and void. *Ib.*
3. Neither *Maryland* nor *Virginia*, without the consent of the other, nor both of them without the consent of Congress, could have repealed the charter of the *Potomac Company*, nor have received or authorised the surrender of it, and its works, to another company. The canal was declared to be, when completed, a public highway through the territories of the sovereign powers which created the *Potomac Company*, in which the *United States* were interested. - - - *Ib.*
4. The consent of Congress to the charter of the *Chesapeake and Ohio Canal Company* was not given as the legislature of the *District of Columbia*. Congress has no capacity to act as the local legislature of that, or any other particular district, and can only act in the capacity of legislature of the Union, in which capacity, it assented to that charter, and no State, after having entered into a solemn agreement with another, is competent to renounce the constitutional assent of Congress as the legislature of the Union. - - - - - *Ib.*
5. The *Potomac Company* having surrendered its charter, and transferred all its rights and property to the *Chesapeake and Ohio Canal Company*, with the assent of Congress, *Virginia*, and *Maryland*, in consideration of a stipulated equivalent in the stock of the Canal Company, the value of which depends upon the inviolate conservation of the chartered rights of the Canal Company, the State of *Maryland* could not, by subsequent legislation, impair the rights of the new Company without the consent of the parties interested. - - - *Ib.*
6. A State may contract with an individual, and it is equally certain, that two or more of the States may enter into a compact or agreement *inter se*. - - - - - *Ib.*
7. A State may contract with an individual by an act of the legislature, and two or more States may contract in that form, *inter se*. *Ib.*
8. The terms "accept" and "assent to," are words of contract, and it was by virtue of such and similar terms in the constitution of the *United States*, that the Federal Government, when it received the sanction of the people, and the re-

quilsite number of States, became a compact between the parties to it and the Federal Government, and not a mere confederacy or league.

Ib.

9. Wherever this court can ascertain with certainty, the conclusions which the Supreme Court of the *United States* has reached in the exposition of the constitution of the *United States*, they will adopt them.

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10. In conformity with this rule, the principles adopted by the Supreme Court, in the ultimate opinion of that court, pronounced in the case of *Ogden and Saunders*, 12 *Wheat*. 213, will be followed by the court. *Ib.*

11. The States possess the power to pass bankrupt laws; but such laws, although constitutional in their action upon the rights of their own citizens, so far as they affect *posterior* contracts, are unconstitutional when they affect the rights of citizens of other States. - *Ib.*

12. The constitutional rule is the same, whether the suit is brought in the *United States* Court, or in the court of the State where the debtor is sued, and by whose laws he is discharged. - - - *Ib.*

See *Contract*, 1, 2, 5, 6.

— *Corporation*, 9, 19, 20, 21, 22.

CONSTITUTION OF THE UNITED STATES.

See *Contract*.

— *Constitutional Law*.

CONSTRUCTION.

1. In the construction of a statute, the whole law is to be examined together, and one part construed by another, with a view to give effect and operation to the whole, if it can be done. *Canal Company vs. Rail Road Company*, - - - 1
2. It is laid down in some of the books, that in construing a statute, the title (being no part of it) is not to be regarded, but we have high authority in this country for a different rule of construction. The title, however, cannot control the express words of the enacting clauses. *Ib.*
3. The preamble of a statute is a key to its construction. - - - *Ib.*
4. Every law which is to wrest from an individual his property, without his consent, must be strictly construed. - - - *Ib.*

5. All statutes *in pari materia* are construed as one law. - - - *Ib.*

6. Statutes should be construed with a view to the original intent and meaning of the makers, and such construction should be put upon them, as best to answer that intention, which may be collected from the cause or necessity of making the statute, or from foreign circumstances, and when discovered ought to be followed, though such construction may seem to be contrary to the letter of the statute. *Ib.*

7. If laws and statutes seem contrary to one another, yet if by interpretation they may stand together, they shall stand; and when two laws only so far disagree or differ, as that by any other construction they may both stand together, the rule, that subsequent laws abrogate prior and contrariant laws, does not apply, and the last law is no repeal of the former. - - *Ib.*

8. Repeals of statutes by implication, are things disfavored by law, and never allowed of, but when the inconsistency and repugnancy are plain and unavoidable. - - *Ib.*

9. When it is manifestly the intention of the legislature that a subsequent act shall not control the provisions of a former act, the subsequent act shall not have such operation, even though the words of it, taken strictly and grammatically, would repeal the former act. - - - *Ib.*

See *Bond*, 1.

— *Contract*, 3, 4, 5.

— *Corporation*.

— *Insolvent Debtor*, 3.

CONTRACT.

1. A State may contract with an individual, and it is equally certain, that two or more of the States may enter into a compact or agreement *inter se*. *Canal vs. Rail Road Company*, - - - 1
2. A State may contract with an individual by an act of the Legislature, and two or more States may contract in that form, *inter se*. *Ib.*
3. No technical words are necessary to constitute a compact or contract, which are convertible terms, and neither need be used in the instrument creating it. - - - *Ib.*
4. It is a mutual consent of the minds of the parties concerned, respecting some property or right that is the object of the stipulation, or

something that is to be done or forborne; a transaction between two or more persons in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised or stipulated by the other; and any words manifesting that *congregatio mentium*, are sufficient to constitute a contract. - - *Ib.*

5. The terms "accept" and "assent to," are words of contract, and it was by virtue of such and similar terms in the constitution of the *United States*, that the Federal Government, when it received the sanction of the people, and the requisite number of States, became a compact between the parties to it and the federal government, and not a mere confederacy or league. *Ib.*
6. A charter being a grant, is an implied contract with the corporation not to re-assert the rights it has granted. - - - *Ib.*
7. It is competent for a sheriff and his deputies to agree upon a particular mode of making returns to writs, which would bind the parties to the contract, but not third persons. *Naylor vs. Semmes*, - - - 273
8. A mere agreement between a debtor and creditor to pay and accept less than the real debt as *nudum pactum*. *Geiser and Knaval vs. Kershner*, - - - 305

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CORPORATION.

1. In the month of June, 1828, *The Baltimore and Ohio Rail Road Company*, claiming under their charter, and in pursuance of locations, surveys and purchases of a route for a contemplated rail road, filed several bills in the Court of Chancery, against the *Chesapeake and Ohio Canal Company*. These bills suggested, that the defendants had obtained an injunction prohibiting the complainants from obtaining a title, or right of way, to their located route, and having thus stopped the progress of the complainants' undertaking, were proceeding in their turn, upon the assumption of a prior and paramount right of

choice, to acquire title to the route surveyed and adopted by the complainants. The chancellor upon this case granted an injunction. The defendants in their answers relied upon a prior right of choice to the route in controversy, and that it was impracticable for both companies to occupy it, for the purposes of their several charters. The Chancellor, upon final hearing, granted a perpetual injunction to the complainants, from which, an appeal was taken. It appeared, that the *Baltimore and Ohio Rail Road Company's* charter, was granted by this *State* on the 28th February, 1827. It declared that as soon as 10m. shares of the capital stock should be subscribed for, the subscribers should be incorporated; and it authorised the construction of a Rail Road from the city of *Baltimore* to some suitable point on the *Ohio* river, with as many tracks as the Directors might deem necessary, with power to enter upon, use, excavate, purchase, and condemn any land which may be wanted for the site of the road, and its necessary works. On the 23d April, 1827, this company was fully organized; its surveys of, and contracts for the route, were made in May and June, 1828. The charter of the *Canal Company* originated with the State of *Virginia*, and was passed on the 27th January, 1824. It authorized the appointment of commissioners to receive subscriptions to its stock, so soon as *Maryland*, *Pennsylvania*, *Congress*, and the *Potomac Company*, should assent to its provisions, and declared that whenever one-fourth of the stock "shall have been subscribed for," then the subscribers, their heirs and assigns, should be incorporated; it also provided for the *Canal Company* becoming the assignee and proprietor of the rights and property of the *Potomac Company*, which was chartered in 1784, to cut such canals, erect such locks, and perform such other works on both sides of the river *Potomac*, as it shall judge necessary, for opening, improving, and extending the navigation of that river, above tide water to the highest part of its north branch to which navigation can be extended, the stockholders of that company

- receiving an equivalent for the transfer, in the stock of the new company. This charter was accepted, assented to, and confirmed by this *State* upon the 31st January, 1825; and by *Congress* so far as to authorize a canal to be cut in the *District of Columbia*, upon the 3d March, 1825; by the *Potomac Company* upon the 16th May, 1825; and by *Pennsylvania*, conditionally, upon the 9th July, 1826. On the 14th November, 1827, the stock of the *Canal Company* was subscribed for, and on the 20th June, 1828, it was duly organized. On the 15th August following, the *Potomac Company* transferred its rights to the *Canal Company*, and this transfer was accepted upon the 17th September, 1828. The canal charter designated the valley of the *Potomac* for the route of the intended canal. It was in proof that between the *Point of Rocks* and *Cumberland*, in the valley of the *Potomac*, on the *Maryland* shore, (which embraced the route in controversy,) there were between 40 and 50 miles of narrow difficult passes, along which, the canal, if made without reference to the rail road, would have to be supported by embankments made in the bed of the river, many feet below the usual low water mark; that if the *Rail Road Company* has the choice of location, then the canal could either not be built at all, or at such an enormous cost as to render it impracticable. HELD, that the *Chesapeake and Ohio Canal Company* has the priority of right in the choice, or selection of ground, for the route and site of the canal in the valley of the *Potomac*, that the injunction should be dissolved, and the bills dismissed with costs. *Canal Company vs. Rail Road Company*, - 1
2. Upon the true construction of the charter of the *Potomac Company*, (act of 1784, ch. 33) the great object in view, was the extension of a water communication from the tide water of the river *Potomac*, up to the highest practicable point on the north branch of that river, and the means such, as might be considered by the corporation necessary, and proper, for the accomplishment of that object, whether by sluices, dams, locks, or by canal navigation.
- The company was not restricted to improvements in the navigation of the bed of the river, nor to an election between different modes of improvement, - - - - - *Ib.*
3. Under this construction of that charter, the valley of the *Potomac*, from tide water to the highest practicable point of navigation on the north branch, was specifically appropriated to the object contemplated; and at the time the Company was formed, or became incorporated, it acquired a vested right (not the actual legal title to the land) to acquire land by purchase or condemnation along the shores of that river, to be exerted, where-soever and whensoever, it should be thought necessary and proper, for the purposes of the charter, *Ib.*
4. The charter of the *Potomac Company* was a contract between the States of *Maryland*, and *Virginia*, and that Company, the obligations of which could not, without the assent of the corporation, be impaired by any act of the legislature of either of the States, nor by the concurrent acts of both, consistently with that section of the constitution of the *United States*, which declares that "no State shall pass any law impairing the obligation of contracts," - - - - - *Ib.*
5. The charter of the *Baltimore and Ohio Rail Road Company* (1826, ch. 123,) could not diminish the prior and paramount right of the *Potomac Company* to select, or appropriate, by purchase or condemnation, any lands in the valley of the *Potomac*, for the route and site of a canal or canals, wherever it should think proper along the borders of the river, either in terms, or by any construction of it, that would have authorised the *Rail Road Company*, without the assent of the *Potomac Company*, to occupy for the route and site of the road, any place along the river, in such a manner, as either to exclude that Company from a priority in a choice of a site or sites, for the construction of the works authorised by its charter, or in any manner to restrict and circumscribe it in the exercise of its prior right of election, - - *Ib.*
6. The *Chesapeake and Ohio Canal Company*, as the assignee of the *Potomac Company*, stands in its place,

- is invested with its prior and paramount rights, by express legislation of this *State*, and transfer from the *Potomac Company*, and is entitled to all its privileges and exemptions. *Ib.*
7. Neither *Maryland*, nor *Virginia*, without the consent of the other, nor both of them without the consent of Congress, could have repealed the charter of the *Potomac Company*, nor have received or authorised the surrender of it, and its works, to another company. The canal was declared to be, when completed, a public highway through the territories of the sovereign powers which created the *Potomac Company*, in which the United States were interested. - - - - *Ib.*
 8. The consent of Congress to the charter of the *Chesapeake and Ohio Canal Company* was not given as the legislature of the *District of Columbia*. Congress has no capacity to act as the local legislature of that, or any other particular district, and can only act in the capacity of legislature of the Union, in which capacity, it assented to that charter, and no State, after having entered into a solemn agreement with another, is competent to renounce the constitutional assent of Congress as the legislature of the Union. *Ib.*
 9. The *Potomac Company* having surrendered its charter, and transferred all its rights and property to the *Chesapeake and Ohio Canal Company*, with the assent of Congress, *Virginia* and *Maryland*, in consideration of a stipulated equivalent in the stock of the Canal Company, the value of which depends upon the inviolate conservation of the chartered rights of the Canal Company, the State of *Maryland* could not, by subsequent legislation, impair the rights of the new Company without the consent of the parties interested. - - - - *Ib.*
 10. The charter of the *Chesapeake and Ohio Canal Company*, clearly and specifically designates the valley of the *Potomac*, for the intended route of the canal it was enacted to open, from tide water to *Savage Creek*. - - - - *Ib.*
 11. Where a corporation was created to effect a particular object, as to make a river navigable which was not so before, and no particular mode of accomplishing that result was pointed out in the charter, it will be intended, that the legislature designed that the river was to be made navigable, in any of the known modes, in which the navigation of a river may be improved. *Ib.*
 12. A corporation may forfeit its charter by non-user or mis-user of its franchises; but it is well known, that such forfeiture can only be enforced by judicial proceedings, instituted for that purpose, at the instance of the government; and that no cause of forfeiture can be taken advantage of collaterally or incidentally; and the same principle applies, as well, to a question of forfeiture of a particular franchise, as of the whole. - - - - *Ib.*
 13. It is not every non-user that will furnish a sufficient ground of forfeiture. - - - - *Ib.*
 14. Where there are various alternative modes of exercising a franchise, authorised without limitation of time by a charter, subject each of them to be changed at the will of the corporation, no experimental trial of one of the modes, could work a forfeiture of the right to resort to either of the other modes, during the continuance of the charter. - - - - *Ib.*
 15. The proceeding by the government for the breach of a condition subsequent, contained in a charter of incorporation, is by *scire facias*, or *quo warranto*. - - - - *Ib.*
 16. A private corporation aggregate may be dissolved by the death of all its members; or by the loss of an integral part, whereby it is rendered unable to do any corporate act, or to restore itself by a new election; or by a surrender to the government of its franchises; or by an act of the legislature repealing the act of incorporation with the assent of the corporation; or by a forfeiture of its charter through abuse or neglect of its franchises, as for a condition broken, there being a tacit condition in every such grant, that the corporation shall act up to the end of its institution. - - - *Ib.*
 17. A forfeiture must be judicially inquired into, but a dissolution need not be. - - - - *Ib.*
 18. A charter being a grant, is an implied contract with the corporation by the State, not to re-assert the rights it has granted. - - - *Ib.*

19. The corporate right to select and acquire land for the authorised purposes of a corporation, is property. It is an incorporeal hereditament, not a legal title to the land itself, nor a mere capacity or faculty to acquire and hold land, such as every individual possesses. But in addition to such capacity, it is a right or privilege, a portion of the eminent domain, vested in the corporation to acquire the legal title to land, subjected by the grant to its will, and thus to convert the incorporeal right into a corporeal hereditament; and in the franchise to choose and condemn land for any particular public purpose, that portion of the eminent domain granted and subsisting in one corporation, cannot be bestowed upon another to the prejudice of the former grant—nor can any other legally acquire any such right of way, or title to land over which the franchise extends, as will hinder the former corporation in the exercise and enjoyment of its franchise. *Ib.*
 20. In ordinary cases, the State may repeal or modify at pleasure any act of incorporation granted by it, before it is accepted, and when no rights have been acquired under it. Until accepted it is not a grant, nor the public faith pledged not to impair it. - - - - - *Ib.*
 21. But in relation to the *Chesapeake and Ohio Canal Company*, although it was not actually incorporated, and had not accepted its charter before the *Baltimore and Ohio Rail Road Company* was chartered and organized, yet it is entitled to all the rights, benefits, and liberties, with which it would have been invested, if it had been organized before any antagonist corporation came into existence, on the ground of the compact and agreement of Congress, and the States of *Virginia* and *Maryland*, *inter se*, and between them and the *Potomac Company*, arising from the reciprocal and concurrent acts of the three former, and the assent of the latter, was the consummation of which, was the consent of the *Potomac Company*, given anterior to the date of the *Rail Road Charter*, and under the Constitution of the *United States*, cannot be impaired by any thing contained in that charter. - *Ib.*
 22. An abridgement of the right of choice in selecting the route, impairs the obligation of the contract. *Ib.*
 23. An act of incorporation, when accepted, amounts to a grant, and the right conferred, a vested franchise, existing independent of any act of location or survey, which the State cannot re-assert, nor grant to any other. It is a prior right to which all subsequent grants must yield. - - - - - *Ib.*
 24. A chartered company may lose its prior right by acquiescing in other works, inconsistent with such rights. - - - - - *Ib.*
- COSTS.
1. In an action brought in the name of the State, for the use of a person entitled to a fund, it is no valid objection to the judgment, that costs have been adjudged against the State. That is the proper mode of entering the judgment since the act of 1794, *ch. 54, sec. 10*, and its effect is to render the equitable plaintiff liable to an attachment for costs, if he fails to sustain his action. *Charlotte Hall School vs. Greenwell*, 407
 2. Upon a successful motion in arrest of judgment, each party pays his own costs. - - - - - *Ib.*
 3. The State is not liable for costs unless there exists some legislation to make her so, and no execution should be awarded against her. *Ib.*
- Evidence, 15.
- COUNTERFEIT MONEY.
- Payments in, a nullity. See Assumpsit.
- COURT OF CHANCERY.
1. When the aid of a court of equity is necessary to enable the husband to obtain possession of the wife's personal property, he must do what is equitable, by making a suitable provision out of it, for her maintenance, and that of her children. *Duvall vs. The Farmers' Bank*, 282
 2. The wife's equity exists, although there has been an assignment for a valuable consideration; and the assignee, standing in the place of the husband, and seeking to withdraw the funds, will be compelled to make the provision. - *Ib.*
 3. In *England*, this principle is founded upon the rule, that the husband, seeking the intervention of a court

- of equity to gain possession of his wife's estate, must do equity. *Ib.*
4. It is immaterial, whether the wife asserts her claim to this equity, in opposition to the complainant in an original bill, or by petition after an order of the court distributing a fund in court, which has not been paid over. In the latter case, it will be considered, as substantially an exception to the auditor's report, distributing the fund out of which she claims payment. Under the order *nisi*, usually passed upon petitions against funds in court, the rights of all the parties interested, will be examined and determined. - - - *Ib.*
 5. The character and extent of the provision for the wife, would seem in every case to be governed by its peculiar circumstances, and be regulated by the whole amount of the wife's fortune, and what the husband had previously received. *Ib.*
 6. Where a will directed real estate to be sold, for the support and education of the testator's children, and a part of the personal estate which ought to have been applied in payment of debts, had been expended to educate and maintain the children, creditors might call upon a court of equity to sell the real estate, so directed to be sold, for the payment of the claims. (*qr.*) *Wyse, et al. vs. Smith and Buchanan*, 295
 7. Where lands are devised to be sold for the payment of debts, and no person is appointed to execute the trust, the practice is to apply to the Chancellor under the act of 1785, *ch.* 72, to appoint a trustee for the purpose of making the sale, and conveying the estate. *Magruder, et al. vs. Peter, et al.* - - - 323
 8. There are many exceptions to, and modifications of the rule, that a trustee, executor or administrator, cannot become a purchaser at his own sale, and that if he does, such sale is void. The *c. q. t.* is the only person who can set such a sale aside, and he may confirm it, or render it valid by acquiescence. *Williams vs. Marshall*, - - - 376
 9. It is only a favor of the *c. q. t.* or party interested, that Chancery will vacate such a sale. A court of law is not the proper tribunal to pronounce it void, or set it aside, merely on the ground that the trustee was purchaser at his own sale. *Ib.*
 10. The rule that a trespasser, who enters upon an infant's real estate, shall be charged as a guardian, is a fiction of a court of equity only. *Burch and Mundell vs. The State*, 444
 10. A decree directed a trustee appointed by the court "to sell such part of the property in the proceedings mentioned, as may be sufficient to pay the sum due from W M, to the heirs of J M." The decree contained the usual instructions as to the course and manner of the trustee's proceedings. The trustee divided the property into lots; and after having effected sales to the amount of the sum due as aforesaid, he exhibited an authority from such of the defendants in the cause as were of full age, which stated "we do hereby authorise and request the said W, trustee aforesaid, to sell the whole of the property mentioned in the said proceedings, on the same terms as is mentioned in the said decree, and authorise and request the Chancellor to ratify and confirm such sale when made by said trustee;" and then proceeded to make further sales at the same time and place. These facts were fully reported to the Chancellor, who ratified the sale. The purchaser of a lot, sold after the production of the aforesaid authority, gave his bond to W, as trustee, and took from him a receipt for the bond and an agreement to make a conveyance upon its payment, signed by W, as trustee. *Held*, That the entire sale was effected by W in his character of trustee. *Brown and Brown vs. Wallace and Mitchell*, - - - - - 479
 11. Whether a sale, made under the circumstances above mentioned, is voidable on account of the trustee having exceeded his authority, and whether he sold as trustee, are not questions open to investigation, after his report, fully disclosing the facts, had been finally ratified, and no appeal taken. These were questions necessarily brought to the Chancellor's attention by the report; and his final ratification was conclusive upon the purchaser. *Ib.*
 12. Where a trustee of the court, at the time of sale, expressly declared he only sold the estate, right, and

- interest, which the parties to the decree had in certain land, and if they had no right he sold none, there can be no pretence of warranty; nor is it necessary in such a case, to determine whether the doctrine of *caveat emptor* applies to trustees' sales in this State. *Ib.*
13. At a trustee's sale a certain lot was represented as containing 143 acres, for which the purchaser bid \$23 per acre. This is a sale by the acre, and the purchaser applying to the court within a reasonable time, would be allowed for a deficiency in the number of acres. Where the sale was made in 1812, the purchaser gave his bond, took possession, and used the property, and made no complaint about deficiency until 1818, he was held to have forfeited all claim to an allowance, - - - *Ib.*
14. The proceedings of a trustee for the sale of real estate, acting under the appointment and orders of the Court of Chancery, cannot be investigated by a bill, filed on the equity side of the County Courts. The relief due to a party injured by such a trustee, may be obtained upon application to the Court of Chancery, under whose exclusive control the trustee acts, and the County Courts, though courts of concurrent jurisdiction in equity matters, have no jurisdiction in such a case. The Court of Chancery cannot interfere by an original bill, where the trustee acts under the orders of the County Court. *Ib.*
15. It is a general rule as to sales under decrees of Chancery, that the purchaser always pays interest according to the terms of the decree from the day of sale, whether he gets possession or not. His getting possession is not a condition precedent to the payment of either principal or interest of the purchase money. The purchaser is presumed to regulate his bidding with a view to the known powers and rules of the court, as to delivering possession. *PER BLAND CHANCELLOR. Ib.*
16. A purchaser at such sale, who does not give his bond for the purchase money, nor otherwise comply with the terms of sale, for several months after the sale, and did not receive possession until he com-
- plied, must still pay the interest from the day of sale. *Ib. Ib.*
17. A party to a suit after the court had decreed his land to be sold, cannot defeat the sale, or give a purchaser under the decree a right to object to his purchase, by making a conveyance to another person. *Ib. - - - Ib.*
18. Where a trustee acting under a decree to sell as much property as may be necessary to discharge debts due from A to B, sells more than is actually necessary, a purchaser cannot be allowed to object to the sale on that account. *Ib. Ib.*
19. In *Maryland*, the rule of *caveat emptor* applies to all judicial sales. Chancery in no case undertakes to sell any thing more than the title of the parties to the suit, and it allows of no inquiry into the title at the instance of the purchaser, or any one else. *Ib. - - - Ib.*
20. A purchaser at a Chancery sale is not answerable for any disposition which the court may make of the purchase money. *Ib. Ib.*
- See Cestui que trust, 1.*
 — Corporation, 1.
 — Evidence, 2, 13, 14, 15.
 — Executor and Administrator, 4.
 — Payment of Debts, 1, 2, 3.
 — Pleas and Pleadings in Equity.
 — Practice in Chancery.
- CRIMINAL LAW.**
1. Under the act of 1809, *ch. 138*, a party may be indicted for wilfully burning a school house not parcel of a dwelling house. Such property is embraced by the terms, "any other out house not parcel of a dwelling house," used in that act. *Jones vs. Hungerford, - 402*
- DAMAGES.**
- See Evidence, 7.*
- DEBTOR AND CREDITOR.**
- See Application of Payments, 1, 2, 3, 4.*
 — Evidence, 6.
 — Fraud, 1.
 — Payment of Debts, 1, 2, 3, 5, 6.
- DEMURRER.**
- See Pleas and Pleading, 2, 12, 22.*
- DEVISE.**
- See Will and Testament.*

DISSOLUTION.

See Corporation, 16, 17.

DISTRIBUTION AND DISTRIBUTION.

See Cestui que trust, 1.

— Computation of kindred.

— Evidence, 11.

— Executor and Administrator, 4.

EJECTMENT.

1. As between the holders of general or common land warrants, there is no priority of right to locate; this warrant, is a mere authority to the surveyor or proper officer to make the survey, and the certificate is the inception of title, to which, the patent, when issued, relates. The title remains in the State until the warrant is located, and will pass under a junior warrant, if first executed. *Canal Company vs. Rail Road Company*, - - - - - 1
 2. In ejectment, separate demises from several lessors may be laid in the declaration; and the plaintiff at the trial may give in evidence, the separate titles of the several lessors to separate parts of the premises in question, and recover accordingly. *Magruder, et al. vs. Peters, et al.* - - - - - 323
 3. A plaintiff in ejectment may recover less than he declares for, but cannot recover more; and he may declare for less than he is entitled to, and recover it, but it must consist of the same nature with that claimed. - - - - - *Ib.*
 4. Guardians who have the lands of infants intrusted to them, may make leases to try titles; but the privilege is not extended to those guardians, to whom belong the custody of the infants alone. - - *Ib.*
 5. When a plaintiff in ejectment relies on a lease made by a guardian, it is necessary to prove at the trial, the legal appointment of the guardian, and that the ward was under age when the lease was made. *Ib.*
- See Will and Testament, 1.

EMINENT DOMAIN.

See Corporation, 1, 19.

ENROLLMENT.

See Evidence, 13.

ESTATES UPON CONDITION.

1. Where the grant of an estate in land is defeasible on the non-performance of a condition subsequent,

it is not defeated upon the mere happening of the contingency upon which it is defeasible, but the law permits it to continue beyond the time when such contingency occurs, unless the grantor or his heirs take advantage of the breach of such condition. *Canal Company vs. Rail Road Company*, - - - - 1

ESTOPPEL.

See Judgment, 1.

EVIDENCE.

1. No evidence can be required to prove the existence of a fact which must have happened according to the constant and invariable course of nature, or to prove any general law, or other public matter which the courts are bound to notice. *PER BLAND, CHAN'R. Ib. Canal Company vs. Rail Road Company*, 1
2. It is not the duty of the courts to take judicial notice of the execution of a public statute. The various modes in which public statutes are carried into effect, by the executive officers of government, are mere facts, and must be proved as facts. If relied upon to avoid an equity upon which an injunction was rightfully granted, upon the motion to dissolve, the court cannot notice them. *Ib.* - - - - *Ib.*
3. Where it was the general usage and custom during the time of a certain sheriff, for his deputies to deliver to him all process which came to their hands, when he endorsed such returns thereon, as he, by the said deputies might be directed; this was held to be competent evidence, in an action brought by the sheriff upon the official bond of one of his deputies—the inquiry being, whether a return so made was a false return or not. And although the plaintiff was not entitled to recover unless the jury believed that such return was made, either by the defendant or his directions, yet it was held, that the custom was *per se*, under the circumstances, *prima facie* proof, as between the sheriff and his deputy, of such a return having been made. *Naylor vs. Semmes*, - - - - - 273
4. It was competent for the sheriff and his deputies to agree upon such a practice, as a law for the regulation of their own official conduct; but such usage or agreement would

- not be binding upon the interests of third persons. - - - - - *Ib.*
5. A witness cannot decline answering a question, merely because it will subject him to a civil liability. - - - - - *Ib.*
6. Where debtors transferred property in trust for the benefit of creditors, who agreed to accept their respective proportions of the estate conveyed, and in consideration thereof, released the debtors from all liability, in an action by one of the creditors against the debtors, it is not competent for the plaintiff to show, in order to avoid the release, either, that one of the defendants had represented to the witness, (who was a creditor,) that the creditors generally, had consented to sign the release, and that he (the witness,) had executed it under that impression, or, that one of the creditors had refused to execute the release, and the defendants in order to induce him to sign it, had secretly agreed to pay him, and did pay him, without the knowledge of the other creditors, an additional consideration. Such evidence does not establish any fraud. *Smith vs. Stone and Mullikin*, - - - 310
7. In an action upon the case for publishing a libel in which plaintiff was charged with being "a degraded scoundrel, liar, and black-guard;" the defendant may prove in mitigation of damages, under the general issue plea, that the plaintiff, shortly prior to the publication of the libel complained of, charged the defendant with being guilty of false swearing in a certain cause in which the defendant had been examined as a witness. *Davis vs. Griffith*, - - - - - 342
8. Judgments between same parties for same cause of action, where admissible, are conclusive as evidence, without being pleaded as estoppels. *Shaffer vs. Stonebraker*, 345
9. Under the plea of not guilty in an action upon the case, the defendant may give in evidence a release—satisfaction—an award—a license to do the act complained of—any justification or excuse, or whatever in equity and conscience, according to the existing circumstances, precludes the plaintiff from recovering. - - - - - *Ib.*
10. Where there is evidence tending to prove a controverted fact it should be left to the jury. *Mitchell vs. Dall*, - - - - - 361
11. One who claims to be entitled to the residue of an intestate's estate, as being within the fifth degree of consanguinity or affinity, is not a competent witness to prove that fact, in an issue joined in an action brought upon an administration bond, for the use of the county schools where the intestate died, for the purpose of defeating the action. *Charlotte Hall School vs. Greenwell*, - - - - - 407
12. The declarations of a deceased party are competent evidence, in an action against his administrator for the residue of his estate, to prove that a particular person was his relation, and the degree of the consanguinity or affinity between them; but a conversation between the deceased and another, in which each reckoned up their descents, when the deceased remarked, if that be the case, we are second cousins, is not admissible evidence for the purpose aforesaid. - - - - - *Ib.*
13. Where a plaintiff claimed to have a mortgage recorded after the time allowed by law, and the defendant set up a claim to an allowance out of the property which it was alleged was a part of the consideration for uniting in the mortgage, evidence that the plaintiff had said, (after the time for recording the mortgage had elapsed,) he never blamed the defendant in the transaction, and that he was willing to allow her \$3000, out of the property in dispute, and that he had employed R to call upon the defendant and explain to her the propriety of accepting that sum, is not sufficient to support the defence. *Chambers vs. Chalmers*, 420
14. Defendants who are properly joined in equity, who have an interest in the same subject matter, and must be affected by the same evidence, are not competent witnesses for each other. - - - *Ib.*
15. Where a married woman and her trustee united in a mortgage of her separate estate, upon a bill to enforce the mortgage, in which they were both made defendants, the trustee being responsible for costs,

- is not a competent witness for his co-defendant - - - *Ib.*
- 16 Where a defendant filed an account in bar, charging the plaintiff with board, clothing, and expenses, to which *non assumpsit* and limitations were pleaded, the plaintiff cannot at the trial, for the purpose of showing that the defendant is entitled to no credit for such matters, prove that the defendant entered upon, and received the rents and profits of the plaintiff's real property. *Burch and Mundell vs. The State*, - - - 444
- See Application of Payments, 4.
- Ejectment, 5.
- Fraud, 1.
- Limitation of Actions, 6, 7.

EXECUTION.

See Rule as to *Hab. fac. pos.* 523.

EXECUTOR AND ADMINISTRATOR.

1. The act of 1818, *en. 217*, declares, that moneys received for the hire or use of negroes, by an executor or administrator, during the time he is entitled to the possession, shall be assets belonging to the estate, and shall be accounted for by him. And such was the law before the passage of that act. *Edelin vs. The State*, - - - 277
2. The act of 1798, having made negroes assets, the hire after the death of the owner became assets also. It was an incident springing out of assets, and partook of their nature. It is like the interest arising after the death of the obligee, in a bond given to him in his life time. *Ib.*
3. Executors and administrators can only sue in the courts of the country from which they derive their power. They have no extra-territorial authority. *Kraft vs. Wickey*, 332
4. An administrator is a trustee for the persons really entitled to the *residuum* of an intestate's estate, and being a trustee, a judgment against him *bona fide* obtained for a distributive share, would be an absolute bar to any subsequent suit, instituted against him for the recovery of the same sum which had been adjudged due to another in the first action. *Charlotte Hall School vs. Greenwell*, - 407
5. Where the personal estate of an intestate consists of slaves, a distributee cannot recover from a delinquent administrator and his sureties, both the appraised value, and the increase, and hire of such slaves, from the time of granting letters or appraisement. He may claim their appraised value and interest thereon, or their increase and hire up to, and real value at, the time of bringing his action. But the pleadings must disclose which course he elects to take. *Burch and Mundell vs. The State*, - 444
6. By recovering the value of the slaves, the distributee casts upon the administrator, the title to the property from the period to which the recovery relates. - *Ib.*
7. An administrator who employs an agent to collect money for the estate under his care, no resort being had to legal process, and the agent being neither a public officer nor an attorney, is not entitled to charge the estate with the compensation of such agent. *Gwynn vs. Dorsey*, 453
8. Where an administrator, in the execution of an order for the sale of his intestate's estate, took a bond with one surety for \$72, which not being paid, he did not sue until one term after the day of payment of the bond had passed, but upon obtaining judgment, issued a *fi. fa.* which did not procure the money, he is not called on to prove the sufficiency of the bond to obtain a credit for such sale, nor is the failure to sue at the first term, of itself, an act of negligence. - *Ib.*
9. Where an administrator manifestly intends fairly to do his duty, the rule should be, not to hold him liable upon slight grounds. *Ib.*
10. Where a sale is made under the authority of the Orphans Court, upon credit, the purchase money to be on interest until the expiration of the term of credit, it is not improper in the administrator to receive the money after the sale, before the expiration of the credit, and thus stop the interest. *Ib.*
11. An administrator may be held to pay interest, from the time he received money belonging to his estate, if he applied it to his own use and profit; and from the end of thirteen months after the date of his letters, if he kept it by him without any apparent reason, and omits to distribute it among creditors. - - - *Ib.*

See Cestui que trust, 1.

- See Computation of kindred, 1.
 — Court of Chancery, 8, 9.
 — Insolvent Debtor, 1.
 — Orphans Court.
 — Payment of Debts, 1, 2, 3.
 — Pleas and Pleading, 1, 19, 20, 21.
 — Trustee, 1, 2, 3.

FEME COVERT.

- See Appeal, 7.
 — Court of Chancery, 1, 2, 3, 4, 5
 — Evidence, 15.

FORFEITURE.

1. A forfeiture of charter must be judicially inquired into, but a dissolution of a chartered company need not be. *Canal Company vs. Rail Road Company*, - - - 1
 See Construction, 4.
 — Corporation, 12, 13, 14, 15, 16, 17.
 — Estates upon condition, 1.

FRANCHISE.

- See Corporation, 2, 3, 5, 15, 19.

FRAUD.

1. When there is an understanding, that all the creditors of a particular debtor are to sign a deed of release, upon certain conditions, and to receive nothing beyond their proportions of the trust fund, or that the deed should be void, any underhand agreement to pay more, would have been a breach of faith, and a violation of the principles of morality and fair dealing. *Smith vs. Stone and Mullikin*, - - - 310
 See Evidence, 6.

GRANT.

- See Estates upon condition, 1.

GUARANTY.

- See Application of Payments, 1, 4.

GUARDIAN AND WARD.

1. The Orphans Court of the county where letters of administration are granted have power under the act of 1798, *ch.* 101, *sub-ch.* 12, to appoint a guardian to the infant children of an intestate, in all cases. *Kraft vs. Wickey*, - - - 332
 2. Guardians like executors and administrators, can only sue in the courts of the country from which they derived their power. They have no extra-territorial authority, *qua* guardian, - - - *Ib.*
 3. The domestic guardian, having the property, is bound to pay for the maintenance and education of the ward. And the foreign guardian,

having the custody of the ward, can enforce the fulfilment of this requisition by an application to the proper tribunal. In such a case the domestic guardian would be regarded as a trustee. This results from the extent of the power granted to our courts, to appoint guardians, viz: in all cases where they grant administration, they may protect the rights of infants interested therein. - - - *Ib.*

4. The rule that a trespasser, who enters upon an infant's real estate, shall be charged as a guardian, is a fiction of a court of equity only. *Burch and Mundell vs. The State*, 444
 See Ejectment, 4, 5.

— Limitation of Actions, 2, 3.

HABERE FACIAS POSS'N.

See Rule of Court, 523.

HUSBAND AND WIFE.

See Appeal, 7.

INCORPOREAL HEREDITAMENT.

See Corporation, 19.

INFANTS.

- See Ejectment, 4.
 — Guardian and Ward.

INJUNCTION.

- See Bond, 1.
 — Corporation, 1.
 — Evidence, 2.
 — Practice in Chancery, 1, 2, 3.

INSOLVENT DEBTOR.

1. On the 4th of September, 1818, F, a resident of the city of *Baltimore*, applied to the Commissioners of Insolvent Debtors, under the act of 1816, *ch.* 221, for relief. A provisional trustee was appointed, and the applicant obtained a personal discharge. In December following, two permanent trustees were appointed, who did not give bonds with security. The applicant was reported against by the commissioners, and received no final discharge. Some time after this he died, and the provisional trustee was appointed his administrator. One of the two persons appointed permanent trustees also died, and the other removed from the State. *Baltimore County Court*, upon application of the creditors in 1829, appointed another permanent trustee, who gave bond with security. *HELD*, that the appointment was duly made, and that the administrator must deliver the property he re-

ceived, as provisional trustee, to the permanent trustee. *Glenn, trustee of Fahnestock, vs. C. W. Karthaus*, - - - 385

2. A citizen of *Maryland*, in 1816, gave his promissory note to a citizen of *Pennsylvania*, and made it payable at a banking house in the latter State. In 1818, the legislature of *Maryland*, by a special act, dispensing with some of the provisions of her general system of insolvency, authorised the maker of the note to obtain a discharge from his debts. *Held*, that as this contract was to be performed in *Pennsylvania*, the insolvent laws of *Maryland* could not be pleaded in bar against it. *Frey vs. Kirk*, 509

3. The insolvent laws of *Maryland* profess to operate upon all claims, whether the creditors are residents of other States or not, and no matter where the contracts are to be performed; they are, however, necessarily qualified by the constitution of the *United States*, and by the decisions of the Supreme Court of the *United States*, declaring the meaning and effect of that constitution. - - - *Ib.*

See Limitation of Actions, 7.

INTEREST.

See Court of Chancery, 15, 16.

— Executor and administrator, 1, 10, 11.

— Orphans Court, 4, 5.

JUDGMENT.

1. It is a general rule that the verdict and judgment upon the merits in a former suit, is, in a subsequent action, between the same parties where the cause of action, damages, or demand, are identically the same, conclusive against the plaintiff's right to recover, whether pleaded in bar, or given in evidence under the general issue, where such evidence is legally admissible, and that such prior verdict and judgment need not be pleaded by way of estoppel. *Shafer vs. Stonebraker*, - - - 345
2. It is no objection to the judgment rendered in a suit in the name of the State for the use of an equitable plaintiff, that costs have been awarded against the State, when she is not responsible for them. *Charlotte Hall School vs. Greenwell*, 407

See Cestui que trust, 1.

— Court of Chancery, 11.

— Executor and Administrator.

JUDICIAL NOTICE.

See Evidence, 2.

JUDICIAL SALES.

See Court of Chancery, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20.

JURISDICTION.

1. A court of law is not the proper tribunal to declare void or set aside, a sale made by a trustee, executor, or administrator to himself, at his own sale. *Williams vs. Marshall*, 376
2. The proceedings of a trustee for the sale of real estate, acting under the appointment and orders of the Court of Chancery, cannot be investigated by a bill filed on the equity side of the County Court; nor can the Court of Chancery interfere, by repeal bill where the trustee acts under the appointment of the county court. *Brown and Brown vs. Wallace and Mitchell*, 479

See Insolvent Debtor, 1.

— Orphans Court, 1.

LAND WARRANT.

See Ejectment, 1.

LEX LOCI.

See Insolvent Debtor, 2.

LIMITATION OF ACTIONS.

1. The plea of limitations cannot be amended, though the amended plea be filed before the rule day has expired. But if a plaintiff amends his declaration, the defendant may plead limitations anew. *State, use of Johnson, vs. Green*, - 381
2. A guardian's bond, as respects the plea of limitations, is, by the act of 1798, *ch.* 101, *sub-ch.* 12, *sec.* 4, placed on the same footing with testamentary and administration bonds. - - - *Ib.*
3. The term within which suits must be brought on guardians' bonds, according to the act of 1729, *ch.* 24, *sec.* 21, is twelve years after the passing of the bonds. *Ib.*
4. A plea of limitations to conform to the act assembly, must allege that twelve years have elapsed from the passing of the bond in the declaration mentioned, before the issuing of the original writ in the cause, or it must contain some equivalent averment. - *Ib.*

5. Limitations must always be pleaded both at law and in equity, and a defendant cannot avail himself of limitations, merely because the proceedings of the plaintiff show a case to which limitations might be applied. *Chambers vs. Chalmers*, 420

6. The act of 1818, *ch* 216, which repealed the exceptions or savings in the act of limitations, (act of 1715, *ch* 23,) in favor of persons beyond seas, is not unconstitutional, as applied to causes of action existing at the time of its enactment; but after its passage, persons beyond seas had the same time to bring their actions, as they would have had if they resided here, and the rights had accrued on the day of the passage of the law. *Frey vs. Kirk*, - - - 509

7. Every acknowledgment to take a case out of the act of limitations, should be of such a character, as that an implied promise may arise therefrom. - - - *Ib*.

8. In an action upon a note, the defendants having pleaded limitations, it appeared that a few days before the commencement of the suit, the defendant was shown the note, and asked if it was his, to which he replied, "yes," and being then asked what arrangement he could make for its payment, replied, "as regards that he could not say." Being then informed that suit was to be brought, he again replied, "you may save yourself the trouble, as I have taken the benefit of the insolvent laws." HELD, that the admission, with the qualification urged by the defendant, could not be construed into the admission of a present subsisting debt; if the excuse was true it was equivalent to a declaration that the debt was discharged; and that it could not be inquired into upon this issue, whether the discharge actually obtained, was valid or not. *Ib*.

MITIGATION OF DAMAGES.

See Evidence, 7.

MONEY HAD AND RECEIVED.

See Assumpsit.

MORTGAGE.

See Pleas and Pleading in Equity, 5.

NEGROES AND SLAVES.

See Executor and Administrator, 5.

NOTICE.

See Cestui que trust, 1.

— Payment of Debts, 5.

ORPHANS COURT.

1. The Orphans Court of the county where letters of administration are granted, have power under the act of 1798, *ch* 101, *sub-ch* 12, to appoint a guardian to the infant children of an intestate in all cases. *Kraft vs. Wickey*, - - - 332
2. The legality and regularity of such an appointment, can in no manner be affected by the fact, that a guardian for such children had been appointed by the tribunals of another State. - - - *Ib*.
3. The Orphans Court have a limited discretion with regard to the amount of an administrator's commissions, and also as to the time and manner of making the allowance. *Gwynn vs. Dorsey*, 453
4. The Orphans Court should aim to make the commissions allowed by them correspond with the duties performed, and in passing every account should look to the advance made in the administration of the assets. - - - *Ib*.
5. The Orphans Court have the power to make an administrator account for interest on money belonging to the estate, which he has applied to his own use, or neglected to distribute and pay over. *Ib*.

PARTNERSHIP.

1. One partner cannot bind another by deed, yet he may execute a release under seal in the partnership name, which will discharge a debtor to the partnership. *Smith vs. Stone and Mullikin*, - 310

PAYMENT OF DEBTS.

1. The personal estate of a deceased debtor is the natural fund for the payment of his debts; and must, in ordinary cases, be first resorted to by the creditor for the satisfaction of his claim. *Wyse, et al. vs. Smith and Buchanan*, - - - 295
2. If personal assets come to the hands of the executor or administrator, sufficient to pay all the debts of the deceased, the creditor must look to that fund for the payment of his debts; and if those assets are wasted, his remedy is on the official bond of the executor or administrator. - - - *Ib*.

3. The real estate of the debtor is protected, unless the personal assets are insufficient; and to authorise the chancellor to pass a decree, to sell the real estate, to pay the debts of the deceased, the bill must allege an insufficiency of personal assets for that purpose, which allegation must be admitted by the answers, or proved. - - *Ib.*
 4. A personal, collateral security, given by an administrator, for a debt due by a deceased intestate, cannot operate to place the creditor in a better situation against the real estate of the deceased, than he would be without such security. *Ib.*
 5. K gave G his single bill for \$100, which was assigned to I. The bill being due, and several years' interest having accrued upon it, K on the 3d April, gave an agent of I's an order on M for \$90 76, payable on the 1st of May. The agent proved, that he received this order to be a payment, provided M accepted it; that if it was not accepted, it was to be returned to K's brother-in-law, who lived in the neighborhood. M refused to accept the order, and some two or three months after, the agent offered to deliver the note to the brother-in-law, who declined receiving it. **HELD**, that this order was not a payment, and that K was not entitled to notice of its non-acceptance, or non-payment, the terms of the contract being a waiver of the right to notice. *Geiser, use of Knaul vs. Kershner*, - - - 305
 6. The general rule is well settled, that the payment of a less sum of money than the whole debt, without a release, is no satisfaction of the plaintiff's claim. A mere agreement to accept less than the real debt, is a *nudum pactum*. *Ib.*
- See Application of Payments*, 1, 2, 3, 4.
- Assumpsit.
 - Court of Chancery, 7.
 - Fraud, 1.

PERSONAL PROPERTY.

- See Executors and Administrators.*
- Payment of Debts, 1, 2, 3.

PLEAS AND PLEADING.

1. In an action upon an administration bond, where the breach assigned was an inventory returned by the administrator, and after sundry disbursements made, there remained a balance of said inventory in the hands of the administrator to be distributed, of which the plaintiff claimed one-fourth as distributee, and the issue was made up upon the truth of such breach, the plaintiff cannot insist upon charging the defendant with any thing not in the inventory, and of course, the hire of negroes, which accrued after the date of the inventory, could not be recovered in such a state of the pleadings. *Edelin vs. The State*, - 277
2. It is a grave question, whether by the Act of 1763, *ch.* 23, the legislature did not intend to interdict, altogether, the use of special demurrers; but the practice of sustaining them by every judicial tribunal in the State has engrafted upon that act, an interpretation, which nothing but another act of Assembly can change. *Shafer vs. Stonebraker*, - - - 345
3. When matter of record is pleaded, the omission to insert, *prout patet per recordum*, is a fatal defect, if assigned as cause of special demurrer; and there is no difference in this respect, between records of the same, and those of any other court. - - - *Ib.*
4. Where matters of fact as well as of record are averred in a plea, the conclusion should be by a general verification, and not with a verification by the record. - *Ib.*
5. A defendant may plead in bar at the same time, a judgment in a prior action by way of estoppel, and the general issue. These are not inconsistent nor incompatible pleas. - - - *Ib.*
6. G on the 3d November, 1829, brought an action upon the case against S, for an injury to his mill, by backing water upon it from a mill-dam below. He claimed damages from the 10th September, 1827, to the time of the impetration of his writ. S pleaded in bar a verdict and judgment in his favor, in a prior action brought by G against him, on the 9th November, 1827, for an injury of precisely the same character, committed upon the 1st June, 1822. Among other allegations, the plaintiff averred in both suits, that the defendant had

- raised and increased the height of his mill-dam or tightened it, whereby the water course was obstructed, &c., and the plea in this action, after setting forth the proceedings in the first cause, prayed judgment if the plaintiff ought to be admitted against the first verdict and judgment, to say that the defendant had so raised his dam, &c. The first action was tried upon the plea of not guilty. Upon demurrer to this plea, it was held, that no matter of fact or of right appearing under the circumstances to have been distinctly put in issue in the first suit, the finding of the jury and judgment of the court, formed no estoppel to a recovery in the subsequent action. - - - *Ib.*
7. The rule by which the sufficiency of a plea of a prior judgment by way of estoppel is to be tested, is, does it plainly appear that the fact or right relied on as a bar, was distinctly put in issue, and found by the jury, in a former suit between the same parties. - - - *Ib.*
8. The plea of not guilty in an action upon the case, puts in issue not only every material fact contained in the declaration, but every defence admissible in evidence under such a plea, of which the defendant should offer testimony. *Shafer vs. Stonebraker*, - - - 345
9. A writ of *capias ad respondendum*, is not amendable. *State, use of Johnson vs. Green*, - - - 381
10. In assigning a breach of the condition of a bond, which stipulated to prosecute an injunction in the Court of Chancery, it is error to aver a failure to prosecute it with effect, upon the equity side of the County Court. This defect may be taken advantage of upon general demurrer. *Morgan vs. Morgan*, 395
11. In an action upon a bond, containing several stipulations in its condition, if the defendant relies upon the plea of performance, that plea should disclose either generally, or specially, that he has complied with all the stipulations of the condition which may be required of him, as the condition is for his benefit. - - - *Ib.*
12. Upon general demurrer to a replication, the court will examine if the defendant's plea be valid, and if that be defective, and the first error in the pleadings, give judgment against him. - - - *Ib.*
13. The charter of the visitors and trustees of the Charlotte Hall School, (act of 1774, *ch. 14*.) is to be considered in the light of a public law. Its visitors are liable to a penalty if they refuse or delay the acceptance of their appointment, and the charter is referred to specially in several public laws connected with the fiscal operations of the government. In alleging its right to sue, it is not necessary to refer to the various acts of assembly which relate to it. *Charlotte Hall School vs. Greenwell*, - - - 407
14. In an action upon an administration bond, the plaintiff cannot recover from a delinquent administrator, both the appraised value and increase and hire of slaves belonging to the deceased's estate. He may claim their appraised value and interest thereon; or their real value at increase, and hire up to the time of bringing his action, but the pleadings must disclose which course he elects to take. *Burch and Mundell vs. The State*, - - - 444
15. A set-off, to be available as such, must always be pleaded or filed in bar. - - - *Ib.*
16. It is necessary to set out in the declaration a contract binding upon both parties, where the suit is instituted to recover damages for the non-performance of a contract. *Berry vs. Harper*, - - - 69
17. A declaration which states an agreement with E (before her intermarriage with H,) and B, that E would sell to B a negro slave belonging to her, for the price of, &c. to be paid when B should be thereto requested, that they mutually promised to observe the said agreement, and that, in pursuance of it, the slave was delivered, shows a contract mutually binding. *Ib.*
18. An original writ cannot be amended, although subsequent proceedings founded upon it may. *Ib.*
19. In an action upon a testamentary or an administration bond, by a creditor of the testator or intestate, it is necessary to allege a compliance with the provisions of the act of 1720, *ch. 24, sec. 2*. *Dorsey vs. The State use of Pannell*, 471
20. The plaintiff must aver and prove

- a return of *non est inventus* on a *capias ad respondendum*, against the executor or administrator, by the sheriff of the county in which such executor or administrator lives; or a return of *nulla bona*, on a *fi. fa.* by the sheriff of the county in which the effects of the testator or intestate lie; or other apparent insolvency of the executor or administrator. And where the plaintiff relies upon the return of *non est*, &c. his cause of action should be alleged to be the same debt, for which the *capias ad respondendum*, stated in the declaration, was sued out to recover. - - - *Ib.*
21. The allegation, that a writ of *ca. ad. res.* was sued out and returned in the county where it appeared from the proof the intestate lived, and letters were granted, and where in fact the administrator was sued upon the administration bond, will not suffice. - - - *Ib.*
22. Upon a general demurrer, the court renders judgment against the party who commits the first error in pleading. - - - *Ib.*
- See Appeal, 7.
- Arrest of Judgment, 3.
- Insolvent Debtor, 1.
- Limitations of Actions, 1, 2, 3, 4.
- Slander, 3, 4, 5.
- ### PLEAS AND PLEADING IN EQUITY.
1. The best test of what are properly averments of facts in a bill or answer, is, whether they are such matters as a witness may be called upon to prove, or the truth of which must be established by evidence, to enable a court to act; if they are not, then such averments are either, mere principles of equity, or some of those public and established facts, of which, the court is bound to take judicial notice without any proof. *PER BLAND, CHAN'R. Canal Company vs. Rail Road Company*, - - - - - 1
2. The rule that a defendant after an answer, may at the hearing, object that the case made by the bill does not entitle the complainant to relief, as it regards some defences, at least, given by statute, cannot apply. Limitations must always be pleaded, both at law and in equity; and a defendant cannot avail himself of limitations, merely because the proceedings of the plaintiff show a case to which limitations might be applied. *Chambers vs Chalmers*, - - - 420
3. The same doctrine, though not perhaps to the same extent, prevails, where reliance is placed by a defendant upon the usurious character of the contract set out in the bill, as the foundation of the plaintiff's proceeding. - - - *Ib.*
4. Where a bill for the specific execution of a contract states a case, which may or may not be usurious, according to the facts which really exist in the case, the statute of usury must be pleaded or relied upon in the answer, or it will not avail the defendant. The rule might be different, if the bill stated a usurious contract which no inference or intendment can help. *Ib.*
5. Where a contract contained divisible, unconnected, and independent stipulations, the performance of which was agreed to be guaranteed by the execution of a mortgage, and afterwards upon a liquidation of the accounts of the parties, the mortgage was executed, it was held to be no objection in equity to enforcing the mortgage, merely because some of the stipulations in the first contract were usurious. To sustain the objection that the mortgage was usurious, it should have been stated, that it was given to secure the usurious stipulations mentioned in the contract. - - - - - *Ib.*
6. After issue joined upon an answer alleging usury, generally, it cannot be objected at the hearing, that this defence had not been taken with more legal precision. This could not be done even at law. - - - *Ib.*
7. Pleadings in Chancery should consist of averments or allegations of fact, and not of inference and argument. - - - - - *Ib.*
- See Payment of Debts, 3.
- ### POTOMAC COMPANY.
- See Corporation.
- ### PRACTICE.
1. Where there is evidence tending to prove a controverted fact it should be left to the jury. *Mitchell vs. Dull*, - - - - - 361
2. The plea of limitations cannot be

- amended, but if the plaintiff amends his declaration, the defendant may plead limitations anew. *State, use of Johnson vs. Green*, - 381
3. After issue joined upon a plea of usury, it cannot be objected at the hearing, that the usury is not pleaded with sufficient precision. *Chambers vs. Chalmers*, - 420
4. It is competent for the court to instruct the jury upon the sufficiency of the declaration in the cause, at the trial. *Berry vs. Harper*, 467
5. Upon general demurrer the court rendered judgment against the party who commits the first error in pleading. *Dorsey vs. The State, use of Pannell*, - - - 471
- See Appeal, 6.
- Pleas and Pleading, 5.

Rule as to *Hab. Fac. Pos.* against the defendants holding over after sale of land by Sheriff, - - - 523

PRACTICE IN CHANCERY.

1. Upon the motion to dissolve an injunction, the Chancellor confines himself exclusive'y to the consideration of the case, or combination of facts set forth in the bill, out of which the equity of the injunction arose, and to the answer of the defendant to those facts. *PER BLAND, CHANCELLOR. Canal Company vs. Rail Road Company*, 1
2. As to all those facts and circumstances of which a court is bound to take notice, on a motion to dissolve an injunction, the parties stand before it in the same situation, as that, in which a dissolution is asked for, on the ground that the facts set forth in the bill give rise to no equity, on which an injunction ought to be granted. *Ib.* - - - *Ib.*
3. If it appears that the facts as stated in a bill, looking to it only, give rise to no equity, it is very certain that the injunction would be dissolved, whether the defendant had answered or not, or however imperfectly he might have answered. *Ib.* - - - *Ib.*
4. Where lands are devised to be sold for payment of debts, and no person is named to execute the trust, the practice is under the act of 1785, *ch. 72*, to apply to the Chancellor to appoint a trustee. *Magruder, et al. vs. Peters, et al.* 323
5. According to the established practice of Chancery in this State, it

- may be taken to be a general rule, that a defendant, although he answers the bill, and issue be joined thereon, may at the hearing object, that the case made in the bill does not entitle the party to equitable relief, and if his objection be sustained, the bill will be dismissed. *Chambers vs. Chalmers*, 420
6. An agreement that a co-defendant might be examined before a Justice of the Peace, to have the same effect as if taken regularly under a commission for evidence, or a commission *de bene esse*, and as if the chancellor's order for his examination as a witness had been obtained, does not waive an objection to the witness's competency, and the exception may be taken at the hearing, - - - *Ib.*

See Court of Chancery, 4.

— Evidence, 2.

— Pleas and Pleading in Equity.

PRACTICE IN COURT OF APPEALS.

See Appeal.

PRIVITY.

See Sheriff.

PROCEDENDO.

See Appeal, 3, 4, 6, 7, 8.

PUBLIC STATUTES.

See Pleas and Pleading, 13.

PURCHASER.

See Court of Chancery, 11, 12, 13, 15, 16, 17, 18, 19, 20.

QUO WARRANTO.

1. The proceeding by the government for a breach of a condition subsequent, contained in a charter of incorporation, is by *scire facias* or *quo warranto*. *Canal Company vs. Rail Road Company*, - - - 1
- See Corporation, 16, 17.

REAL ESTATE.

See Court of Chancery, 9, 13, 18, 19.

RELEASE.

- See Evidence, 6.
- Fraud, 1.
- Partnership, 1.
- Payment of Debts, 5, 6.

RENTS AND PROFITS.

See Guardian and Ward, 4.

SCIRE FACIAS.

See Corporation, 15.

SET-OFF.

1. The rents and profits of land received by a mere trespasser, cannot form the basis of a set-off to a

claim founded upon contract, made by such trespasser. *Burch and Mundell vs. The State*, - -

2. A set-off, to be available as such, must always be pleaded, or filed in bar, - - - *Ib.*

SHERIFF.

1. A sheriff's deputy, for money received in the course of his duty, and which, ordinarily, ought to be paid over to his principal, may, with the consent of such principal, implied from circumstances, make himself responsible to the party to whom the money actually belonged, in *assumpsit*. *Keene vs. Thompson*, 463

See Evidence, 3, 4.

SLANDER.

1. Under the act of 1809, *ch.* 138, a party may be indicted for wilfully burning a school house not parcel of a dwelling house. Such property is embraced by the terms, "any other out house not parcel of a dwelling house," used in that act. *Jones vs. Hungerford*, 402
2. Maliciously to charge another with wilfully burning a school house, the property of another, is *per se* actionable. - - - *Ib.*
3. But when a plaintiff alleged in his declaration, that the defendant maliciously said of him, "he burnt the school house," *inuendo*, "the school house of the defendant," or "you burnt the school house," or the plaintiff by name "burnt the school house," with the same *inuendo*, this was held insufficient upon a motion in arrest of judgment. These words do not *per se*, necessarily convey the meaning that the plaintiff had wilfully burned the house. - - - *Ib.*
4. Where words are not *per se* actionable, and there is not a proper *colloquium* stated, nor an *inuendo*, that the defendant meant by the words spoken, to impute to the plaintiff a crime, nor any special damage alleged, the action cannot be sustained. - - - *Ib.*
5. The report of the case of *House vs. House*, 5 *Harr. and Johns.*, 125, explained, - - - *Ib.*
- See Evidence, 7.

STATUTES.

See Construction, 1, 2, 3, 4, 5, 6, 7, 8, 9.

See Corporation.
— Evidence, 2.

SUBSTITUTION.

See Court of Chancery, 6.

SURRENDER.

See Corporation, 9.

TRESPASSER.

See Guardian and Ward, 4.

TROVER.

See Executor and Administrator, 6.

TRUSTEE.

1. There are many exceptions to, and modifications of the rule, that a trustee, executor, or administrator, cannot become a purchaser at his own sale, and that if he does, such sale is void. *Williams vs. Marshall*, - - - 376
2. A trustee who purchases at his own sale, may be treated in Chancery according to circumstances, as a purchaser for the benefit of the *cestui que trust*. - - - *Ib.*
3. In some cases, a trustee will be protected in his purchase at his own sale; as if the *c. q. t.* be of full age, and under no disability, and with a full knowledge of the transaction, lies by for an unreasonable time, or being under age, or other disability, does not in a reasonable time after coming to age, or the disability is removed, seek to set aside the sale, or treat the trustee as a purchaser for his benefit, it will be considered as an acquiescence in the sale, - - - *Ib.*
4. Where a recovery is had against a trustee in a court of competent jurisdiction, where he has been guilty of no fraud or collusion, but acted *bona fide* in resisting claims against him, he is not answerable over to another, though not a party to the suit, for the same sum adjudged against him. *Charlotte Hall School vs. Greenwell*, - - - 407
- See Court of Chancery, 10, 11, 12, 13, 14.
- Evidence, 15.
- Executor and Administrator, 8, 9, 10, 11.
- Insolvent Debtor, 1.
- Practice in Chancery, 4.

USAGE.

See Evidence, 3, 4.

USURY.

See Pleas and Pleadings in Equity, 3, 4, 5.

WIFE'S EQUITY.

See Court of Chancery, 1, 2, 3, 4, 5.

WILL AND TESTAMENT.

1. A testator who was seized in fee, devised as follows: 1st. "The proceeds of all my real estate shall be vested in my wife, for the maintenance and education of my children. 2d. All my debts to be paid as speedily as possible, for which purpose, I desire that the tract of land on which D lives, together with all my personal property thereon, may be sold, and applied to that purpose." 4th. "I desire in the general distribution of the residue of my estate, in the division between my sons and daughters, my sons may receive in the proportion of five to three. The widow renounced the will. The executors sold the tract mentioned in the 2d clause, and received a part of the purchase money. The purchaser subsequently petitioned for relief under the insolvent laws, and the balance of the purchase money be-

ing unpaid, the widow and children brought an ejectment for this land, each counting upon an undivided interest. HELD, that the legal estate in the lands mentioned in the 2d clause of the will, vested in the children of the testator, as his heirs at law, liable to be divested, upon a legal sale of it under the will, and a compliance with the terms of sale, and payment of the purchase money. *Magruder, et al. vs. Peters, et al.* - - - 323

2. The intention of a testator is to be collected from the will itself; and it is perfectly clear, that the testator in this case did not intend his children should take the land, on which D lived, as devisees. - - - *Ib.*

3. A devise of the profits of land does not *ex vi termini* pass the land, but only affords evidence, that it was the intention of the testator it should pass. Where a different intention is manifest upon the face of the will, that evidence is rebutted. *Ib.*

See Court of Chancery, 6.

WITNESS.

See Evidence, 5.



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